

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OCEAN TOMO, LLC,) Docket No. 12 C 8450
Plaintiff/)
Counterdefendant,) Chicago, Illinois
v.) July 27, 2017
JONATHAN BARNEY and) 1:30 p.m.
PATENTRATINGS, LLC,)
Defendants/)
Counterplaintiffs.)

VOLUME 15
TRANSCRIPT OF PROCEEDINGS - Bench Trial
BEFORE THE HONORABLE THOMAS M. DURKIN

APPEARANCES:

For the Plaintiff/ SPENCEPC by
Counterdefendant: MR. WILLIAM C. SPENCE
405 N. Wabash Avenue, Suite P2E
Chicago, IL 60611

For the Defendants/
Counterplaintiffs: JENNER & BLOCK LLP by
MR. DAVID C. LAYDEN
MS. KATHARINE R. CILIBERTI
353 N. Clark Street
Chicago, IL 60654-3456

Court Reporter: SANDRA M. MULLIN, CSR, RMR, FCRR
Official Court Reporter
219 S. Dearborn Street, Room 1432
Chicago, IL 60604
312.435.6053
laura_renke@ilnd.uscourts.gov

1 (Proceedings heard in open court:)

2 THE COURT: All right. Are we ready to proceed?

3 MR. SPENCE: We are, your Honor.

4 THE COURT: Okay. Let's have the witness re-take
5 the stand. Mr. Layden, you had no additional questions;
6 correct?

7 MR. LAYDEN: That's correct, your Honor.

8 THE COURT: Sir, you're still under oath.

9 Mr. Spence, you may begin. Is there a binder for
10 the cross?

11 MR. SPENCE: There is, your Honor.

12 THE COURT: Okay. I'm not welcoming it, but I
13 expected there would be. So I just wanted to make sure
14 before we get started.

15 MR. SPENCE: I will represent we're not going to
16 get through all these.

17 THE COURT: You're not going to go through them or
18 not going to --

19 MR. SPENCE: We might not get through all of them,
20 but they're there in case we need them. I don't want you to
21 think we're going to go through two binders of documents.

22 THE COURT: All right. Off the record.

23 (Discussion had off the record.)

24 THE COURT: Back on the record. You may begin.

25 MICHAEL PAKTER, DEFENDANT'S WITNESS, PREVIOUSLY SWORN,

CROSS-EXAMINATION

BY MR. SPENCE;

Q. Mr. Pakter, good to see you again.

A. And you too, Mr. Spence.

Q. So I'd like to start, if I could, with your capital account report. Okay?

A. Sure.

Q. That's one of the two expert reports that you provided in this case; right?

A. Correct.

Q. Let's take a look at PX-185, please. Now, this is that report; correct?

A. Is that the same as DX-611?

Q. PX-185 -- you know, we probably don't have the binders to you yet. That's going to be difficult. It should be on the screen too, but at any time if it's easier to look on the screen --

A. I can't pick that up, Mr. Spence, please.

Q. No problem. I'll be happy to help you. And if at any time you need me to come over and help, just let me know. I do remember from our deposition you had a back surgery, so if there is anything I can do to facilitate, I'm happy to do so. I'll take that one from you.

A. Certainly. Thank you for your time.

0 I will sit it right here in case you

1 A. Appreciate it.

2 Q. As I said, I will put most of these on the screen for
3 you, Mr. Pakter, so if it's easier to look at the screen,
4 feel free to do that. But I want you to have the full
5 document in case there is something more that you want to
6 look at.

7 A. Thank you for that.

8 Q. So what you see on the screen now is PX-185. Do you see
9 that?

10 A. I do.

11 Q. And that's your -- one of your two expert reports in
12 this case; right?

13 A. It is. It's -- I'm just turning it up in the binder.

14 Q. Sure. Let me know when you get there.

15 A. I'm there.

16 Q. So this report concerns your attempt to reconstruct
17 Mr. Barney's capital account; correct?

18 A. I don't know about an attempt, but I did reconstruct the
19 capital account.

20 Q. And if you take a look at Page 18 with me, again, we
21 will put it on the screen, but feel free to turn to the page.

22 A. Okay.

23 Q. You see here on Page 18 at the top: "I concluded that
24 Ocean Tomo LLC, A, should have categorized the gain on the
25 2009 ICAP sale transaction as other net profits under the

1 operating agreement." Right?

2 A. That's correct.

3 Q. Other net profits?

4 A. That's correct.

5 Q. And then you say B was correct of categorized the gain
6 in the 2009 ICAP sale as net profits from operation. Was
7 incorrect, rather. Right?

8 A. It was incorrect of categorized the gain on the ICAP
9 sale transaction as from operations.

10 Q. All right. So the issue here is, with regard to that
11 ICAP transaction, should it be categorized as other net
12 profits or net profits from operations; right?

13 A. Correct.

14 Q. And it's your position that that should have been
15 categorized as other net profits?

16 A. Correct, not from operations.

17 Q. Let's take a look at Page 12 of your report. Now, as
18 part of your work to develop your expert opinion, you looked
19 at a number of documents; right?

20 A. That's right.

21 Q. One of the documents, or one of the sets of documents
22 you looked at, is a consolidated financial statement of Ocean
23 Tomo for fiscal years ended December 31st, 2009, and 2008.
24 Do you see that?

25 A. I do.

1 Q. And you have a footnote next to there, Footnote 26;
2 right?

3 A. I do.

4 Q. Now, that footnote says, "Which annual financial
5 statements were audited by Ernst & Young." Right?

6 A. Correct.

7 Q. If we take a look at PX-81, please. Again, we will pull
8 it up on the screen. If you'd like to look at it in the
9 binder, feel free to do so. These are those financial
10 statements; correct?

11 A. They are.

12 Q. From Ernst & Young?

13 A. Correct.

14 Q. Was the audit from Ernst & Young a clean audit?

15 A. It was.

16 Q. They didn't raise any issues with the way that Ocean
17 Tomo categorized that ICAP transaction; correct?

18 A. If you please turn one more page, I will double check,
19 but I believe they issued a clean audit opinion.

20 Q. Sure. Can we go to the next page please, Dave?

21 A. You just go to the audit report. The audit report
22 concludes: "Present fairly in all material respects."

23 MR. SPENCE: move to admit PX-81, your Honor.

24 THE COURT: Any objection?

25 MR. LAYDEN: No, your Honor.

1 THE COURT: It's admitted.

2 (PX-81 admitted into evidence.)

3 BY MR. SPENCE:

4 Q. Now, also on Page 13 of your report, this is going back
5 now to PX-185, you refer to the Ocean Tomo LLC consolidated
6 financial statements for fiscal years ended December 31,
7 2010, and 2009. Do you see that?

8 A. I do.

9 Q. And, again, there is a footnote, Footnote 29. This is
10 on Page 13 of your report.

11 A. I agree.

12 Q. If we go down to that footnote, it says, "Which annual
13 financial statements were audited by Blackman Kallick?" Do
14 you see that?

15 A. I do.

16 Q. Did Blackman Kallick issue a clean audit?

17 A. I believe so, but we could just look to double check.

18 Q. Sure. Let's take a look at PX-107, please.

19 A. And if you would kindly turn to the audit report page.
20 I agree it is what is known as a clean opinion.

21 Q. And the ICAP transaction was material?

22 A. It was.

23 Q. True for both of those audited financial statements;
24 right?

25 A. True.

1 Q. No issues raised, again, with the way that Ocean Tomo
2 categorized those proceeds from the ICAP transaction; is that
3 fair?

4 A. There is no separate disclosure in either audit report
5 flagging the ICAP transaction.

6 THE COURT: Would you have expected there to be
7 some flagging of it if the transaction was somehow
8 miscategorized?

9 THE WITNESS: If in the view of those auditors they
10 viewed it as improperly financially reported, they ought to
11 have added an explanatory paragraph.

12 THE COURT: And is it traditional for a public
13 accountant reviewing the financial statements of a company
14 they're auditing to look at legal documents that deal with
15 categorizing transactions that find their way onto the
16 financial statements?

17 THE WITNESS: It's usual. I would expect they
18 would have looked at that transaction.

19 THE COURT: I think you testified yesterday you
20 often look at legal documents, accountants -- auditors look
21 at legal documents as part of their auditing function to
22 understand why a company does what they do when they
23 categorize certain things on their financial statements;
24 correct?

25 THE WITNESS: Correct.

1 MR. SPENCE: Your Honor, move to had admit PX-107.

2 THE COURT: Any objection?

3 MR. LAYDEN: No, your Honor.

4 THE COURT: It's admitted.

5 (PX-107 admitted into evidence.)

6 BY MR. SPENCE:

7 Q. So, in any event, you disagree with the way that Ocean
8 Tomo categorized those proceeds as net profits from
9 operations rather than other net profits; correct?

10 A. I disagree with the allocation of the net profit for
11 purposes of allocating it between the members, as well as I
12 disagree with the financial reporting in the financial
13 statements.

14 Q. One of the bases for that disagreement is that you don't
15 believe Ocean Tomo should have categorized those proceeds
16 from ICAP as other net profits; right?

17 A. Yes, there is a difference between the allocation and
18 the financial reporting. I believe they're both incorrect.

19 Q. Okay. Now, to look at what you think should have been
20 done, you actually reconstructed the capital member accounts;
21 right?

22 A. I did.

23 Q. Let's take a look at Page 27 of your expert report.
24 This is still staying with PX-185.

25 THE COURT: Can I follow up on your last statement.

1 You disagree with the financial reporting, so you're
2 basically disagreeing with Blackman Kallick and Ernst &
3 Young; correct?

4 THE WITNESS: Correct.

5 THE COURT: All right. The allocation, is that
6 something that is contained in the financial reports where
7 your opinion is at odds with Kallick -- Blackman Kallick and
8 EY, or is it something that isn't necessarily encompassed in
9 their opinion?

10 THE WITNESS: It's not encompassed in their
11 opinion. It's a separate decision how you allocate member's
12 net profits and how you disclose the profits of the year.
13 Essentially they are two different questions. There is
14 actually a third question; and that is, how does the treasury
15 account for the actual proceeds. But treasury, financial
16 reporting and the allocation between members are three
17 separate decisions.

18 THE COURT: All right. You disagree with the
19 accounting firms on the financial reporting.

20 THE WITNESS: Correct.

21 THE COURT: Your opinion as to allocation does not
22 require -- or does it require you to disagree with the
23 accounting firms?

24 THE WITNESS: No, that's -- that's why I'm not
25 always understanding the linkage between the issues. They're

1 unlinked, really.

2 BY MR. SPENCE:

3 Q. Okay. Mr. Pakter, let's talk about the allocations
4 portion of that that you just discussed. Okay?

5 A. Okay.

6 Q. Now, if we go to Page 27 of your expert report, based on
7 your opinion that ICAP proceeds are other net profits, you
8 attempt to reconstruct Mr. Barney's capital account at Ocean
9 Tomo; correct?

10 A. Yeah. I'm going to quibble with you every time you say
11 "attempt."

12 Q. Okay.

13 A. But apart from that, yes, I reconstructed the capital
14 accounts.

15 Q. Thank you. It's unintended, so if I do it again, please
16 feel free to raise it.

17 What you did, then, is you came up with a variety
18 of methods; correct?

19 A. Correct.

20 Q. Five methods -- I think five methods, to be specific?

21 A. Correct.

22 Q. Those are Methods 1, 2, 1A, 2A and Method 3; right?

23 A. Correct.

24 Q. Now, you understand that Method 3 is something that
25 defendants don't intend to pursue in this litigation;

1 correct?

2 A. I do understand that.

3 Q. So that leaves us with four methods; right?

4 A. I agree.

5 Q. Let's take a look at DX-581, please. This is a
6 demonstrative that you prepared; correct?

7 A. Correct.

8 Q. And it essentially summarizes the differences between
9 these five methods that we discussed; right?

10 A. Correct.

11 Q. And so let's look at Method No. 1, the first column
12 there. You make a number of assumptions; is that right?

13 A. Correct. I do.

14 Q. Those assumptions are listed in the four rows containing
15 texts?

16 A. Correct.

17 Q. So one of those assumptions you make in the second row
18 for Method No. 1 is that Ocean Tomo was permitted to cancel
19 Mr. Barney's 23.1 membership units in June, 2011; right?

20 A. Correct.

21 Q. And there is a difference between Method 1 and Method 2,
22 in at least the fact that you change your assumption; right?

23 A. Correct.

24 Q. You now make the assumption that Ocean Tomo was not
25 permitted to cancel Mr. Barney's 23.1 membership units in

1 June 2011; right?

2 A. Correct.

3 Q. What's the basis for that assumption?

4 A. The basis for the assumption is that I don't believe
5 it's my place to decide whether or not it was proper or
6 improper to cancel Mr. Barney's 23.1 membership units. And
7 essentially I'm deferring to the court to make that final
8 decision. I'm not making it.

9 Q. Okay. But you have to have some basis for including it
10 as an assumption in your opinion; correct?

11 A. Well, that's only one of two options. Either the
12 23.1 units were or were not canceled. And so in Method 1 and
13 1A, I'm assuming they were permitted to be canceled; and 2
14 and 2A, I'm assuming not. But I am not making a final
15 decision here.

16 Q. So there is no agreement that you're depending upon to
17 make that assumption; is that right?

18 A. I'm not opining whether it was proper or improper to
19 cancel the 23.1 units.

20 Q. I understand that, but at some point you had to come to
21 the understanding, or you had to accept somebody's
22 representation, that that option, that assumption, was even
23 possible; right?

24 MR. LAYDEN: Objection, form, compound.

25 THE COURT: What was the second thing you said?

1 MR. LAYDEN:compound.

2 THE COURT: Overruled.

3 BY THE WITNESS:

4 A. Are you asking me where I even started to come up with
5 this decision tree?

6 BY MR. SPENCE:

7 Q. Right. So how did you even decide that this was an
8 assumption that you should include in your opinion?

9 A. Thank you. I got that from either the complaint or the
10 counterclaim, together with a request from retaining counsel
11 to make a decision -- to develop a decision tree for the
12 court doing down one path or the other path.

13 Q. Anything else?

14 A. It's my belief that that's an issue that will have to be
15 decided by the court; and, therefore, the court needs the
16 calculations either way.

17 Q. Okay. If that assumption turns out to be incorrect, I'm
18 talking about the assumption here in the second row in the
19 second column, that assumption turns out to be incorrect,
20 then this methodology would be incorrect; right?

21 A. Well, it's either-or. So, in any event, it either takes
22 place or doesn't take place. If the question didn't exist at
23 all, then the court would go down the not-permitted-to-cancel
24 road.

25 Q. Correct. And if the court goes -- let's say the court

1 decides that Ocean Tomo was permitted to cancel Mr. Barney's
2 23.1 membership units in June of 2011. If the court decides
3 that, then Method 2 isn't accurate; is it?

4 A. Method 2 would be not applicable and the court would
5 disregard it.

6 Q. Let's talk about method -- the next method over,
7 Method 1A.

8 A. Okay.

9 Q. Now, here what you've done is you've essentially taken
10 Method 2 and you've added an additional assumption at the
11 bottom. Is that fair?

12 A. I think I took Method 1 and added an additional
13 assumption in the last row.

14 Q. Okay. Thank you for the clarification. So you took
15 Method 1 and you added the additional assumption shown here
16 at the bottom, the fourth row?

17 A. Correct.

18 Q. And there it says, "Mr. Barney was entitled to his
19 percentage interest of the 25 percent dividend allocation;
20 right?

21 A. Correct.

22 Q. And the additional assumption that you make here is that
23 he is also entitled to a percentage interest of the firm
24 credit portion of the bonus pool. Do you see that?

25 A. I do.

1 Q. I'm going to ask you the same question. What is that
2 assumption based on?

3 A. It is based on, one, the framing of the argument in the
4 complaint or counterclaim, to which I understand that this is
5 a dispute between the parties. It is also based on retaining
6 counsel's request for a scenario with and without the
7 calculation. And it's also based on my understanding that,
8 in the period 2011 through 2016, Mr. Barney remained a member
9 and so would have been entitled to either the 25 percent
10 dividend allocation and/or the firm credit portion of the
11 bonus pool, multiplied by his then percentage membership
12 interest.

13 Q. Okay. Other than what you testified about so far, is it
14 based on any other agreement that you know about?

15 A. I would also have to say it is based on my review of
16 what is known as the comp plan, which I viewed as an integral
17 part of understanding the overall allocation of member's
18 profits in these scenarios.

19 Q. What comp plan are you referring to?

20 A. I'm referring to a comp plan which I itemized in my
21 report, or I believe I did. So if you'll look at Page 24 of
22 my report, I have reference to a compensation agreement. And
23 to the best of my recollection, that is described in either
24 Footnote 52 or 53. I just want to see if I can find the
25 footnote here. It's either the document at Footnote 52 or

1 the document at Footnote 53. I don't immediately recall.

2 Q. Okay. And unfortunately I don't have those available, I
3 don't think, right now, but we will find those during the
4 break, and we will go back to this topic.

5 Let me ask you another question related to this.

6 What legal claim is that assumption related to?

7 A. I submit that calls for a legal conclusion. I'm doing
8 an accounting here, I'm not making legal claims.

9 Q. Would you say the same with respect to this issue of
10 whether or not Ocean Tomo was permitted to cancel
11 Mr. Barney's membership units, ask you what legal claim is
12 that related to, would you give me the same answer?

13 A. I'm not articulating the legal claim here, I am making
14 an accounting based on the existence of that legal claim
15 which the court will evaluate and rule on.

16 MR. SPENCE: And, your Honor, just as a remainder,
17 so there was some significant changes made to Mr. Pakter's
18 report that we didn't have a chance to depose him on. So
19 this cross-examination is going to be a little bit
20 untraditional in the sense that we're going to be taking some
21 deposition-like questions as well as some typical
22 cross-examine-like questions. I'm not trying to be obtuse on
23 this, but I don't understand what legal claim this issue of
24 cancellation of shares relates to.

25 THE COURT: Well, I think the witness has answered

1 he can't help you on that either. Presumably the -- we will
2 be enlightened through closing arguments.

3 MR. LAYDEN: Your Honor, I will just point out,
4 just to be very clear, everything Mr. Pakter has testified to
5 so far and has shown in his chart about 23.1 membership units
6 being canceled --

7 THE COURT: Slow down.

8 MR. LAYDEN: About the membership units being
9 canceled and about the firm credit that Mr. Spence has
10 referred to he has described in his expert report that was
11 issued on May 1st. It's not something that was disclosed in
12 these revised schedules, so.

13 THE COURT: This isn't hard. I do have to decide
14 certain hypothetical -- I have to decide whether actions
15 taken by Ocean Tomo were correct and within their legal
16 boundaries. If they were, certain facts -- parts of this
17 chart will be applicable. If they weren't, parts of this
18 chart will not be applicable. That's how I view it. If
19 that's wrong, you should explore that question more, or
20 enlighten me in closing arguments. But that's how I view
21 this. I don't think it's that difficult a set of constructs
22 to work out of, so.

23 BY MR. SPENCE:

24 Q. So, again, with respect to this Method 1-A that was just
25 discussed, is that assumption that you make, that Mr. Barney

1 would be entitled to a percentage of interest of a firm
2 credit, if that assumption turns out to be incorrect, then
3 Method 1-A would be inaccurate; right?

4 A. If the court concluded other than I have stated for 1-A,
5 then 1-A would not apply.

6 Q. Okay. Then, without going into it in detail, if we go
7 over to 2-A, you combine some of those assumptions we've
8 already talked about; right? In the second row you see that
9 you assume that Ocean Tomo was permitted to cancel
10 Mr. Barney's 23.1 membership units; right?

11 A. That's correct.

12 Q. And then under that you say, "He is also entitled to his
13 percentage of interest in the firm credit." Right?

14 A. That's correct.

15 Q. And so, again, if one of those assumption turns out to
16 be incorrect, that method would be incorrect; right?

17 THE COURT: I think you said all these -- it may be
18 inapplicable.

19 BY MR. SPENCE:

20 Q. Inapplicable, sorry. That method wouldn't be applicable
21 if one or more of those assumption turns out to be incorrect;
22 right?

23 A. I think I'll go with what the court just said a minute
24 ago. These are a set of constructs that enable the court to
25 make decisions at some point and then run down the applicable

1 scenarios. Clearly if the court concludes that something
2 doesn't work or doesn't apply, the court will ignore that
3 whole column.

4 THE COURT: And, Mr. Spence, if I find that certain
5 of these assumptions are not correct and the methods are
6 inapplicable and there is no applicable method, then I have
7 to decide whether or not, if damages are awarded, I can
8 arrive at a damage figure based on math I do, or whether I'm
9 not in a position to do that. But that's how damages work.

10 MR. SPENCE: I don't disagree, your Honor.

11 THE COURT: Okay. We're all on the same page on
12 that.

13 MR. SPENCE: I was just hoping to point out some of
14 the assumptions to help your Honor reach a decision.

15 THE COURT: Understood.

16 BY MR. SPENCE:

17 Q. So now let's talk about your calculations when you tried
18 to reconstruct Mr. Barney's capital account. Okay?

19 A. I'm going to quibble with you again about the "try to."

20 Q. Sorry. Let's go through some of the calculations in
21 your efforts to reconstruct Mr. Barney's capital account;
22 fair enough?

23 MR. LAYDEN: Objection, your Honor, form.

24 THE COURT: Overruled. It's not even a question.
25 He is just providing a book end to what he is about to get

1 into, so.

2 MR. LAYDEN: Fair enough.

3 THE COURT: The objection is overruled.

4 BY MR. SPENCE:

5 Q. I'm going to write on the board here to help me as much
6 as you, frankly, Mr. Pakter. So what we're talking about
7 here are two concepts; right? We have other net -- net
8 profits, and then we have net profits from operations; right?
9 Do you agree with me those are the two main concepts that are
10 discussed in your report on capital accounts?

11 A. I agree with you that the net profits for the year of
12 Ocean Tomo are divided between net profits from operations
13 and other net profits as part of the final decision of
14 member's allocation of net profits.

15 Q. Okay. Let's go back to your report, PX-185. And I want
16 to direct you to Page 4. In your first paragraph here on
17 Page 4, Mr. Pakter, you say, "I was engaged to reconstruct
18 Jonathan Barney's member's capital account and to calculate
19 Jonathan Barney's undistributed profits defined later."
20 Right?

21 A. Correct.

22 Q. "And distributions owed to Jonathan Barney under the
23 Ocean Tomo LLC operating agreement defined later." Do you
24 see that?

25 A. I do.

1 Q. And then if we go to Page 7?

2 A. And related matters.

3 Q. I'm sorry?

4 A. And related matters.

5 Q. Thank you. If we go to Page 7. I'm sorry, rather than
6 Page 7, go to Item 7 on Page 4 -- Page 5, perhaps. Are you
7 with me?

8 A. I am.

9 Q. It says here, in Item 7, you prepared a financial
10 analysis reconstructing Jonathan Barney's capital account and
11 calculating his undistributed profits and unpaid
12 distributions from January 1st, 2008, through December 31st,
13 2016. Right?

14 A. Correct.

15 Q. And then it says, "Based on alternative methodologies
16 and/or assumptions." Right?

17 A. Correct.

18 Q. Those are the five alternative methods that we just
19 discussed?

20 A. Correct.

21 Q. Then if we go to Page 10 of your report, you provide a
22 definition here for undistributed profit amounts; right?

23 A. I do.

24 Q. What I would like, Mr. Pakter, if you would, just help
25 me walk through this calculation. Okay?

1 A. Okay.

2 Q. So beginning with the definition of undistributed
3 profits amounts, it says here, "For each member, an amount
4 equal to the amount shown on the books and records of the
5 company as of January 1, 2008." Right?

6 A. Correct.

7 Q. And it says, "But prior to allocations of net profits
8 from operations." Right?

9 A. Right.

10 Q. Plus, "A, cumulative allocations of net profits from
11 operations." Right?

12 A. Right.

13 Q. And that's under Section 9.01A?

14 A. Right.

15 Q. "Minus cumulative distributions made to such member."
16 Do you see that?

17 A. I do.

18 Q. And so when we're talking about undistributed profits
19 amounts, it's a pretty simple formula; right?

20 A. Simplicity is subjective.

21 Q. So if I want to calculate undistributed profits amounts,
22 I begin with what's the value on the book; right?

23 A. Correct.

24 Q. So I begin with his balance. And then from that
25 balance, I add something; right?

1 A. Correct.

2 Q. I add, "allocations of net profits from operations."

3 Right?

4 A. Correct.

5 Q. And then I subtract something; don't I?

6 A. Correct.

7 Q. And what I subtract is the distributions; correct?

8 A. Correct.

9 Q. That's the money paid, in other words. And if I do

10 that, if I begin with the value that's on the books and I add

11 the net profits from operations and I subtract the

12 distributions, then that gives me the undistributed profits

13 amounts; correct?

14 A. Correct.

15 Q. And that's what you did; right?

16 A. I did.

17 Q. And this definition that we just went through, that's

18 taken directly from the operating agreement; correct?

19 A. Correct.

20 Q. Now, you provided your detailed accounting, your

21 calculations, in a variety of schedules to your report; isn't

22 that right?

23 A. Correct.

24 Q. And let's take a look, please, at PX-241. And we have

25 to go a ways into the document here, all the way to Page 67,

1 if you would. Again, we will pull it up on the screen for
2 you, Mr. Pakter, if it's easier.

3 A. Either way.

4 Q. If we go to Page 67, we see your Schedule 14; right?

5 A. Yes.

6 Q. Do you need a moment?

7 A. I'm okay.

8 Q. And Schedule 14 is titled, "Undistributed Profits,
9 Baseline Method." Do you see that?

10 A. I do.

11 Q. This was your re-creation of undistributed profits
12 amounts?

13 A. Yes.

14 Q. What we just defined; right? Based on allocations and
15 distributions actually reported by Ocean Tomo; correct?

16 A. Yes, before the application of my methodology.

17 Q. Before, I'm sorry, what?

18 A. Before the application of the various assumptions.

19 Q. All right. And so, in other words, this is done without
20 any modifications to the numbers based on your opinion that
21 the proceeds from ICAP should have been categorized in a
22 different manner; right?

23 A. It's based on none of my alternative scenarios or
24 constructs.

25 Q. Based on your review of the financial documents, this is

1 the way that you think Ocean Tomo actually did it; correct?

2 A. I believe so, yes.

3 Q. And if I look at undistributed profits as of
4 January 1st, 2008, it's one of the first lines there to the
5 left. Do you see that?

6 A. I do.

7 Q. Then you show a number of figures; right? For
8 Mr. Malackowski, approximately \$1.5 million; correct?

9 A. Yes.

10 Q. And then Mr. Carter, 980,000, and Mr. Barney, 91,000;
11 right?

12 A. Correct.

13 Q. And next to those figures you have a Footnote 2. Do you
14 see that?

15 A. I do.

16 Q. And if we look at that Footnote 2 on the next page, you
17 indicate here that you take those numbers from the second
18 amended and restated operating agreement; right?

19 A. I do.

20 Q. And then you repeat those numbers there. Those are the
21 numbers that you start with; correct?

22 A. Correct.

23 Q. So, in other words, when we talk about this definition
24 for undistributed profits amounts, those are -- that's the
25 balance; right?

1 A. Correct.

2 Q. That's their starting point. And then what you do in
3 the Schedule 14 for each year after is you added allocations
4 from net profits from operations; right?

5 A. Yes.

6 Q. That's the second part of our definition right here;
7 correct?

8 A. Yes.

9 Q. And then you subtracted the distributions?

10 A. Yes, and in the baseline, as Ocean Tomo did it before
11 scenarios.

12 Q. And you do that for every year from 2008 to 2016; don't
13 you, Mr. Pakter?

14 A. Correct. Yes.

15 Q. Now let's go to Schedule 15. So this is on Page 70 of
16 Plaintiff's Exhibit 241. And, again, on the top, right-hand
17 corner here you see a reference to undistributed profits,
18 Method 1; right?

19 A. I do.

20 Q. So this is your Method 1 reconstruction for Mr. Barney's
21 undistributed profits amount; right?

22 A. Correct.

23 Q. And as you described earlier, your Method 1
24 reconstruction was to treat those proceeds from the ICAP
25 transaction not as net profits from operations, but as other

1 net profits; right?

2 A. No. I treated those as allocable to Mr. Barney based on
3 his membership percentage interest for that year.

4 Q. It's your opinion in this case those should have been
5 categorized as other net profits; isn't that right?

6 A. It's my opinion that Ocean Tomo should have allocated
7 the ICAP transaction as other, but my final conclusion and
8 opinion for 2009, is that all of the 2009, net profits should
9 have been allocated based on Mr. Barney's membership
10 percentage interest because there were also losses that year;
11 and, but for the ICAP transaction, the year would have been a
12 loss. So my final opinion is that all of 2009 is allocated
13 by member's percentage interest.

14 Q. True. So I understand your final opinion. But remember
15 I asked you, I wanted you to walk through this with me one
16 step at a time. Will you continue to do that with me?

17 A. Yes, but not if you're going to mischaracterize my
18 conclusion.

19 Q. Well, let's be very clear on your basis for your
20 conclusion. Let's go back to Page 18.

21 THE COURT: Before we get there, let's go off the
22 record for a minute.

23 (Discussion had off the record.)

24 THE COURT: All right. We are back on the record,
25 and you may continue.

1 BY MR. SPENCE:

2 Q. Okay. Mr. Pakter, so during that short break we went
3 through your Schedule 14; correct?

4 A. We did.

5 Q. And that was your effort to reconstruct Mr. Barney's
6 undistributed profits amounts; correct?

7 A. That was my reconstruction of undistributed profits in
8 Method 1.

9 Q. Great. And now we're on Schedule 15; correct?

10 A. We are.

11 Q. And just before we had a technical difficulty, you said
12 you didn't want me to change any of your conclusions in this
13 case; right? Is that what you told me?

14 A. No, I told you that I had concluded that the 2009, ICAP
15 sale transaction should have been allocated to Mr. Barney
16 based on his percentage interest.

17 Q. Absolutely, Mr. Pakter, and I get that loud and clear.
18 But what I want you to do is walk through with me and explain
19 why. Can you do that?

20 A. Sure.

21 Q. So we looked at Page 18 of your capital account report,
22 correct, PX-185?

23 A. We did.

24 Q. And on Page 18, remember you agreed with me that you had
25 concluded that Ocean Tomo should have categorized the gain on

1 the 2009 ICAP sale transaction as other net profits; right?

2 A. Right.

3 Q. That was your conclusion?

4 A. Right.

5 Q. Under the operating agreement; right?

6 A. Right.

7 Q. This one right here, so we're all on the same page;
8 right?

9 A. Right.

10 Q. Not net profits from operations; correct?

11 A. They should not have done -- they should not have
12 categorized it as other than from operations.

13 Q. They should have categorized it as other net profits.
14 That's your conclusion?

15 A. Yes.

16 Q. Now, based on that conclusion, that those proceeds
17 should have been categorized as other net profits, I want to
18 go back to Schedule 15. This is Plaintiff's Exhibit 241.

19 A. Okay.

20 Q. Now we're back to Page 70, if you would.

21 A. Okay.

22 Q. And just so we're all on the same page, literally and
23 figuratively, you see "other" on the top, left corner says,
24 Undistributed Profits Method 1." Right?

25 A. Correct.

1 Q. This is your attempt -- this is your effort to
2 reconstruct Mr. Barney's capital account using your Method 1.
3 Is that fair?

4 A. This is my reconstruction of undistributed profits
5 Method 1.

6 Q. Okay. Now, when we looked at Schedule 14, we started
7 with undistributed profits as of January 1st, 2008; right?

8 A. Correct.

9 Q. That's on the top, left-hand corner?

10 A. Correct.

11 Q. And then we went to the right, and we read those numbers
12 off; right?

13 A. Correct.

14 Q. And we referenced that Footnote No. 2; didn't we?

15 A. We did.

16 Q. And that Footnote No. 2 referred to the operating
17 agreement; correct?

18 A. Correct.

19 Q. That was your starting point for your calculations in
20 Schedule 14; right?

21 A. Correct.

22 Q. And you have the same starting point here as
23 Schedule 15; don't you?

24 A. Correct.

25 Q. And you did the same thing; right? You started from

1 that point, the balance, and then you added net profits from
2 operations; right?

3 A. Correct.

4 Q. You didn't -- you didn't add other net profits; right?

5 You added net profits from operations?

6 A. No, what I did now was add Mr. Barney's membership
7 percentage interest of 2009. You're missing a step in my
8 report. On Page 21 of my report, in the last paragraph, I
9 come to a final conclusion about 2009. And it is my final
10 conclusion in 2009, that the 2009 profit should have been
11 allocated to Mr. Barney based on his percentage interest.

12 Q. Okay. And, again, I know you want to go right to that
13 final conclusion, Mr. Pakter, but before we get there, let's
14 just walk through the steps. Okay?

15 A. Sure.

16 Q. So here we are on Schedule 15; right?

17 A. Yes.

18 Q. You start with the undistributed profits as of
19 January 1st, 2008; correct?

20 A. Correct.

21 Q. And then for 2008, year-end 2008, you do two things;
22 right? You first add the net profits from operations for
23 2008; right?

24 A. Right.

25 Q. And then you subtract from that the 2008 distributions

1 and tax payments; isn't that right?

2 A. Right.

3 Q. And you do that for each of Mr. Malackowski, Mr. Carter
4 and Mr. Barney; right?

5 A. Right.

6 Q. And, for example, with Mr. Barney, that gives you a
7 year-end 2008 undistributed profits of \$40,568; right?

8 A. Correct.

9 Q. And just like you did in Schedule 14, you continue that
10 year after year on Schedule 15; right?

11 A. Correct.

12 Q. Except when we get to the next line here, when we get to
13 your calculations for year-end 2009 undistributed profits,
14 the numbers are different from Schedule 14; aren't they?

15 A. Correct.

16 Q. And they're different because, if we go to that 2009 net
17 profits from operations line --

18 And, Dave, if you could just highlight, it's seven
19 lines down there, where it says the \$4,389,516. So the line
20 just above that, if you could. If you could highlight that
21 whole line for me.

22 Do you see that on the screen, Mr. Pakter?

23 A. I do.

24 Q. Now, what that is, it's the gain from the ICAP
25 transaction; isn't it?

1 A. No, it's not.

2 Q. Those aren't ICAP proceeds that you identified here on
3 that line?

4 A. No, it is the entirety of 2009 net profits.

5 Q. And does that include any proceeds received from the
6 ICAP transaction?

7 A. It includes the gain on sale of ICAP.

8 Q. And that's why it's different; isn't it, Mr. Pakter?

9 MR. LAYDEN: Objection, form, your Honor.

10 THE COURT: Overruled.

11 BY THE WITNESS:

12 A. I didn't understand your question.

13 BY MR. SPENCE:

14 Q. Well, let's go to Schedule 14 real quick.

15 A. Oh, that's 15.

16 Q. Page 68. Do you see that?

17 A. 14, yes.

18 Q. So if we are on Schedule 14, I'm sorry, we look at
19 Page 67.

20 And, Dave, if you could just highlight that same --
21 that same line for me there.

22 And so in Schedule 14, what you're doing is you're
23 doing it based on your review of the financial records at
24 Ocean Tomo; right?

25 A. Excuse me?

1 Q. In Schedule 14?

2 A. Yes.

3 Q. You're reconstructing the capital account based on the
4 records at Ocean Tomo; right?

5 A. I'm reconstructing the undistributed profits on a
6 baseline method without any of my assumptions or scenarios.

7 Q. Correct. And part of that includes the proceeds from
8 the ICAP transaction; right?

9 A. That includes the allocations of portions of the ICAP
10 transaction according to member percentages and portions, not
11 according to member percentages.

12 Q. Right. And if we look at that line right there, this is
13 on Schedule 14 now, you see a different number for
14 Mr. Barney; right?

15 A. I thought you showed me 14 on screen.

16 Q. I'm sorry?

17 A. I thought we were looking at 14 on screen.

18 Q. Right. My point is there is a different number that you
19 use in Schedule 15 versus what you use in Schedule 14; isn't
20 that right?

21 A. That is correct.

22 Q. You don't -- when you're calculating the undistributed
23 profits amounts, you use a different number to get to the
24 total for that year; right?

25 A. The 2009 allocation to Mr. Barney is different in the

1 baseline than in Method 1.

2 Q. And it's different because you're including in that the
3 proceeds from the ICAP transaction; right?

4 A. No, it's different because now there are three line
5 items that are allocated based on the member's percentage
6 interest versus two previously.

7 Q. Because you're adding in the ICAP proceeds in Schedule
8 15; aren't you?

9 A. There are also ICAP proceeds in 14.

10 Q. Which -- but you're allocating those to Mr. Barney in
11 Schedule 15; right?

12 A. They're allocated portions to Mr. Barney in 14 and in
13 15.

14 Q. Right. But in Schedule 15, you're including that
15 allocation in his undistributed profits amounts; aren't you?

16 A. I'm including it at a different percentage.

17 Q. Right. And you're doing that because you classified
18 that as net profits from operations. Is that why?

19 A. No, because now I'm taking the entirety of 2009, as
20 Ocean Tomo did it, except I'm now giving Mr. Barney his
21 entire 8.7 percent of all allocations.

22 Q. Right because it's your opinion that Mr. Barney should
23 have been allocated all of his percentage interest of ICAP
24 proceeds; isn't it?

25 A. It's my opinion Mr. Barney should have been allocated

1 all of his member's percentage in 2009.

2 Q. And you have that opinion because it should be
3 considered other net profits. Is that why?

4 A. No, I have that opinion because the ICAP transaction
5 should have been allocated based on member's percentage
6 interest taken together with the losses for the year.

7 Q. But you agree with me, don't you, Mr. Pakter, that the
8 only thing you should be adding to undistributed profits
9 amounts is net profits from operations; right?

10 A. In the schedule I have, the net profits for the year.

11 Q. And this is the only thing you should be adding; right?

12 MR. LAYDEN: Objection, form, your Honor.

13 THE COURT: He is saying --

14 MR. LAYDEN: He is saying this. I don't know what
15 he is referring to.

16 BY MR. SPENCE:

17 Q. Net profits from operations is the only thing you should
18 be adding with you trying to calculate the undistributed
19 profit amounts for Mr. Barney; right?

20 A. This is a schedule of undistributed profits based on all
21 of '09 being undistributed based on his member's percentage
22 interests.

23 Q. I understand, Mr. Pakter. But when you're doing that
24 calculation in Schedule 15, right, when you're trying to
25 calculate undistributed profits amounts, the only thing you

1 should be adding year after year is net profits from
2 operations. Isn't that a fact?

3 A. That is the definition of undistributed profits in the
4 definition section of the operating agreement.

5 Q. Correct. And based on that definition in the operating
6 agreement, when you run that calculation, the only thing you
7 add is net profits from operations; right?

8 A. That's what it says, and I have added the entirety of
9 '09 for purposes of this undistributed profits calculation.

10 Q. Understood. You didn't do that, did you, Mr. Pakter?

11 You also included what you want to categorize what your
12 conclusion is in this litigation, proceeds from sale of ICAP,
13 and that's other net profits, but your conclusion is it,
14 Mr. Pakter?

15 A. No, you missed my conclusion at the end of the ICAP
16 section on Page 21 of my report.

17 Q. And, again, Mr. Pakter before we get to the end, I want
18 to get to the process about how you got there. Okay?

19 A. Okay.

20 Q. So if we go to Page 18, again, this is your expert
21 report in this case; correct?

22 A. Correct.

23 Q. This is PX-185, Page 18. In black and white it says, "I
24 concluded that Ocean Tomo should have categorized the gain on
25 the 2009 ICAP sale transaction as other net profits." Is

1 that your conclusion in this case, Mr. Pakter?

2 A. It is.

3 Q. And if those proceeds, Mr. Pakter, are categorized as
4 you concluded in this litigation as other net profits, then
5 under the operating agreement they should never be added to
6 undistributed amounts; should they?

7 MR. LAYDEN: Objection, your Honor, asked and
8 answered.

9 THE COURT: Overruled.

10 BY THE WITNESS:

11 A. There is another path for those profits to be allocated,
12 and that is as firm credits through to the total, which is
13 why I made a decision to allocate 2009 in total to the
14 schedule of undistributed profits.

15 BY MR. SPENCE:

16 Q. And you did that even though you categorized those
17 proceeds from the ICAP transaction as other net profits;
18 correct?

19 A. No, I said in one case I'm saying they shouldn't have
20 done that. But then I reached a final conclusion that I keep
21 on pointing you to final conclusion, which I understand you
22 keep on not wanting to go to.

23 Q. Well, let's just go to the agreement itself, and we can
24 solve this problem very quickly.

25 MR. LAYDEN: I hate to interrupt, but we lost the

1 realtime again.

2 THE COURT: I just e-mailed Laura. You can either
3 continue, or you can wait until we get it re-fixed.

4 MR. LAYDEN: I don't want to break up Mr. Spence's
5 cross. If you want to continue, that's fine.

6 THE COURT: That's fine.

7 MR. LAYDEN: Noted for the record.

8 THE COURT: All right. Do you have a preference?

9 MR. SPENCE: Two-minute break, your Honor.

10 THE COURT: All right. Two-minute break it is. If
11 anybody needs to leave the room, go ahead.

12 (Recess taken.)

13 THE COURT: Okay. Let's continue. Sir, are you
14 ready?

15 THE WITNESS: I am.

16 THE COURT: Okay. Please have a seat and we can
17 continue.

18 BY MR. SPENCE:

19 Q. All right. Mr. Pakter, so I told you that we would get
20 to the operating agreement. So let's take a look at that.
21 And this is DX-052.

22 There may not be a copy in your folder, in your
23 binder, your Honor, but it's in the direct binder,
24 Mr. Pakter.

25 THE COURT: That's fine.

1 MR. SPENCE: DX-52, if I said the wrong number.

2 Thank you. 5-2.

3 THE COURT: 0-5-2?

4 MR. SPENCE: Correct.

5 THE COURT: Do you want to stand?

6 THE WITNESS: Because the document is over there.

7 THE COURT: That's fine. He is going to put it on
8 the screen, too.

9 THE WITNESS: I'll turn it around.

10 BY MR. SPENCE:

11 Q. Would you like to look at a hard copy of that as well?

12 A. I'm good. I'm good. I'm good.

13 Q. If you need it, let me know.

14 A. I'm good.

15 Q. So what we're looking at here in DX-52 is the operating
16 agreement; correct?

17 A. Correct.

18 Q. This is the agreement that you relied upon for your
19 calculations to reach your final conclusion on undistributed
20 profits amounts; right?

21 A. Correct.

22 Q. Let's take a look at Section 9.01.

23 If we could, Dave.

24 Let's look at 9.01, where it says, "Allocations of
25 Net Profits and Net Losses." Do you see that?

1 A. I do.

2 Q. Net profits are discussed in 9.01-A; right?

3 A. Correct.

4 Q. Net profits from operations. Do you see that?

5 A. I do.

6 Q. So this is 9.01-A. And if you look at the next section
7 down, this is 9.01-B. This is where you get net losses from
8 operations; right?

9 A. Correct.

10 Q. And then 9.01-C, other net profits; right?

11 A. Correct.

12 Q. Just so we don't lose track of this, let's go back to
13 other net profits. This is 9.01-C. Do you agree?

14 A. I do.

15 Q. Now let's go to, I think it's Page 10, probably, of the
16 operating agreement. At the top, do you see the definition
17 there for undistributed profits amounts; right?

18 A. I do.

19 Q. And that's what you calculated for Mr. Barney, right,
20 undistributed profits amounts?

21 A. I did.

22 Q. Now, that definition says, "Undistributed profits means
23 for each member an amount equal to the amount shown on the
24 books and records of the company as of January 1, 2008."
25 Right?

1 A. Correct.

2 Q. And that's set forth in Schedule 1. Do you see that?

3 A. Correct.

4 Q. And that Schedule 1 is where you took those starting
5 numbers for Schedule 14 and 15; right?

6 A. Correct.

7 Q. And then it says from that starting number you do two
8 things. No. 1, you add cumulative allocations of net profits
9 from operations. Right?

10 A. Correct.

11 Q. And then, No. 2, you subtract the cumulative
12 distributions made to each such member; right?

13 A. Correct.

14 Q. So take the balance, add the net profits from
15 operations, subtract the distributions. Fair enough?

16 A. Correct.

17 Q. And when it references net profits from operations, I'm
18 on the third line from the bottom here, it says under Section
19 9.01-A. Do you see that?

20 A. I do.

21 Q. 9.01-A is what we looked at before; right? This is the
22 provision dealing with net profits from operations; right?

23 A. I agree.

24 Q. Now, nowhere in that definition do you see any
25 reference to 9.01-C; right?

1 A. I agree.

2 Q. That's something different altogether?

3 A. I agree.

4 Q. So if the ICAP proceeds are treated as other net profits
5 and they're allocated under this Section 9.01-C, they would
6 never be included in your undistributed profit amounts; would
7 they?

8 A. But that's not what Ocean Tomo did. They allocated it
9 as net profits from operations based according to the
10 member's percentage interest.

11 Q. Mr. Pakter, I'm asking you for your opinion in this case
12 and your basis for arriving at that opinion, not what Ocean
13 Tomo did. You shouldn't have put that number in there,
14 should you have?

15 A. Oh, I absolutely should put the number.

16 Q. Under the contract, it only provides for the addition of
17 net profits from operations under 9.01-A. You agree with
18 that; right?

19 A. I do, but you're glossing over my final conclusion and
20 my final allocation.

21 Q. I understand. You're going to walk through this with me
22 step by step. So we're not there yet, Mr. Pakter.

23 A. Okay.

24 Q. That calculation is not supposed to include other net
25 profits; is it?

1 A. The operating agreement does not include other net
2 profits in undistributed profits calculation.

3 Q. That's exactly right. Thank you. And so let's go back
4 to your Schedule 15 now. This is, again, the schedule based
5 on your Method 1.

6 A. Correct.

7 Q. And what I want to focus you on is this number here
8 where it says, "2009 Net Profits from Operations." Do you
9 see that?

10 A. I do.

11 Q. And, Dave, if you could just highlight that line again,
12 where it shows \$579,747 for Mr. Barney. If you could just
13 highlight that whole line there. Thank you.

14 And so that number isn't accurate if you do the
15 calculations under the operating agreement; is it,
16 Mr. Pakter?

17 A. That's not true.

18 Q. Mr. Pakter, why is it that you're including proceeds
19 from the ICAP transaction in your calculation for
20 undistributed profits amounts?

21 A. I am taking the three amounts that were reflected as
22 making up the 579,747, and I am allocating each of them
23 according to the member's percentage; whereas previously,
24 only two of the three line items were treated. And either
25 they process as member's percentage interest or they go

1 through from credit and get allocated as dividend. So I took
2 the total of 2009, and allocated based on the member's
3 percentage interest.

4 Q. And did that total?

5 THE COURT: Hang on for one second, please. Off
6 the record.

7 (Discussion had off the record.)

8 THE COURT: Okay. All right. Back on the record.
9 Mr. Spence, are you ready to proceed?

10 MR. SPENCE: I am, your Honor.

11 THE COURT: All right.

12 BY MR. SPENCE:

13 Q. So, Mr. Pakter, just before we took a break, you
14 mentioned something about firm credit. Can you show me where
15 you talk about firm credit in the section of your report
16 dealing with your opinion on treatment of the ICAP proceeds?
17 And I'll direct you, if you want, to Pages 18 and 21. These
18 are the portions of your report dealing with that issue.

19 A. After I completed my analysis of the ICAP transaction, I
20 reached the conclusion taken as a whole that it should be
21 allocated -- that 2009, should be allocated based on member's
22 percentage interest. I then took those three numbers, which
23 I discussed during my direct examination, and allocated the
24 third one based on a member's percentage interest as the
25 first two were. I included the aggregate of those three

1 numbers at the member's percentage interest in my calculation
2 of undistributed profits.

3 Q. What three numbers are you talking about?

4 A. The three numbers that are shown on the profit
5 allocation in a document -- it's -- I don't remember the
6 bates number. It's the document that Mr. Layden forgot to
7 raise, and in his catch-all question he said, anything else?
8 And I said, yes, one more document.

9 Q. Does any of those -- do any of those three numbers
10 include any of the proceeds from ICAP?

11 A. Well, they do.

12 Q. They do?

13 A. Yes.

14 Q. So you're including proceeds from the sale of ICAP into
15 your calculation for undistributed profits amounts?

16 A. I'm including all of '09 as allocatable based on
17 member's percentage interest.

18 Q. Including the proceeds from sale of ICAP; correct?

19 A. Including both the ICAP transaction and the loss for the
20 year taken in aggregate.

21 Q. Okay. And just so that we're clear, those sales from --
22 those proceeds from the ICAP transaction -- when you talk
23 about the proceeds from the ICAP transaction, those are the
24 proceeds that you concluded in your expert opinion should be
25 classified under the operating agreement as other net

1 profits; right? That's your conclusion?

2 A. It's my conclusion that they should have been treated as
3 other in order to be allocated to Mr. Barney based on his
4 membership percentage interest. But if that's not done that
5 way, there was another path through the diagram to allocate
6 it through from credit to Mr. Barney, also based on the
7 member's percentage interest. And so I resolved the issue by
8 simply allocating the year based on a member's percentage
9 interest.

10 Q. Okay. Now, I understand you want to say there is
11 another method for doing it, but that's not the method that
12 you used in your expert report in this case; is it, Mr.
13 Pakter?

14 A. The method that I used was to take the year as a whole
15 times the member's percentage interest as a whole.

16 Q. In other words, you took some portion of those proceeds
17 from the ICAP transaction, and after you concluded they
18 should be categorized as other net profits under 901-C, you,
19 nonetheless, included them in your calculation for
20 undistributed profits amount; isn't that the truth,
21 Mr. Pakter?

22 A. For the reasons I explained, they are ultimately
23 included in 2009, as the profits for the year.

24 Q. Okay. Well, you're not doing it under the definition
25 provided in the operating agreement; right?

1 A. I am following now the ultimate allocation of 2009, as
2 an undistributed profits amount.

3 Q. I understand your conclusion, and I know you want to get
4 there. I want to know how you get there, Mr. Pakter.

5 A. I'm already there. Okay.

6 Q. I want to know how you got there, Mr. Pakter. You
7 didn't do it under this definition provided in the operating
8 agreement; did you?

9 MR. LAYDEN: Objection, your Honor, asked and
10 answered.

11 THE COURT: It is getting repetitive. You can
12 answer this last question. Go ahead.

13 BY MR. SPENCE:

14 Q. Yes or no, did you do it under this definition provided
15 in the operating agreement?

16 A. I did, under the undistributed profits amount
17 calculation in the operating agreement.

18 Q. Can you show me which provision of the operating
19 agreement you relied upon to include proceeds from sale of
20 the ICAP transaction in your calculation for undistributed
21 profits amounts? Can you please show me that provision in
22 the operating agreement?

23 A. Undistributed profits amount on Page 10 of the agreement
24 means an amount equal to the amount shown on the books and
25 records of the company. I took the amounts from the books

1 and records of the company for 2009, and allocated based on
2 the member's percentage interest.

3 Q. And did you do that pursuant to the definition provided
4 here for undistributed profits amounts on Page 10 of the
5 operating agreement?

6 A. I did it based on that schedule which included in the
7 accounting books and records of the company the final amounts
8 of 2009, profits.

9 Q. Mr. Pakter, with all due respect, that's not my
10 question. Did you, or did you not, do it pursuant to the
11 definition provided here for undistributed profits amount on
12 Page 10 of the operating agreement? It's a simple yes or no
13 question.

14 MR. LAYDEN: Objection, asked and answered and
15 argumentative.

16 THE COURT: Sustained.

17 BY MR. SPENCE:

18 Q. Okay. Mr. Pakter, let's assume that these proceeds from
19 ICAP are as you concluded, other net profits. So now we're
20 under 901-C. If your conclusion is correct, Mr. Pakter,
21 wouldn't you agree that those profits should not be included
22 in this calculation, as this definition is provided here?
23 Nothing here includes 901-C; does it?

24 A. Nothing there includes 901-C.

25 Q. So if we go back to your Schedule 15, we need to make a

1 change to it, don't we, to make it consistent with this
2 definition provided here under the operating agreement.

3 Don't you think that's fair, Mr. Pakter?

4 A. I don't think that's fair, and I don't agree.

5 Q. So you don't agree with me that the change you would
6 have to make if you wanted to properly calculate
7 undistributed profits under the operating agreement is that,
8 on your line here showing 2009, Net Profits from Operations,
9 and where it shows \$579,747 for Mr. Barney, you don't agree
10 that you'd have to subtract that number out; right?

11 A. No, because I'm now going to the accounting books and
12 records of the company for 2009, and allocating the pieces in
13 the books and records according to the member's percentage
14 interest.

15 Q. Okay. Well, let's see what happens if we do subtract
16 that number out. Let's say that that's what you have to do
17 to make this calculation consistent with the definition
18 provided in the operating agreement. If we subtract that
19 out, we get to different numbers here for year end 2009;
20 correct?

21 A. If you subtract anything from the 579,000
22 mathematically, you will alter the subtotals.

23 Q. Okay. So if we took -- let's just start with
24 Mr. Malackowski, for example. Where it says year end 2009,
25 undistributed profits, do you see the total there is

1 \$5,000,033 -- sorry, \$5,033,230; right?

2 A. I see it.

3 Q. And if we are going to change this so that we're not
4 including any of the ICAP proceeds as net profits from
5 operations, then we'd have to take out that \$4,389,516. Do
6 you see that?

7 A. If you are removing all of the 2009 profits, then, yes,
8 the balance after that would go down.

9 Q. Let me ask you this very simple question because we
10 talked about this at deposition. But for including those
11 proceeds from the ICAP transaction as net profits from
12 operations, Ocean Tomo would have been operating at a loss
13 that year; right?

14 A. Correct.

15 Q. Okay. So there wouldn't have been any amount of money
16 here if it were treated as other profits; right? It's only
17 because we're treating it as net profits from operation that
18 you get to this \$4 million figure; isn't that right?

19 A. Two different questions. But for the ICAP transaction,
20 2009, would have been a loss. And if you don't include any
21 part of 2009, in this calculation, then the 5 million would
22 go down by the 4.3 million.

23 Q. Exactly. And that would leave you with about \$600,000;
24 wouldn't it, Mr. Pakter?

25 A. Under your scenario, yes.

1 Q. And with Mr. Carter we could do the same thing; couldn't
2 we?

3 A. We could.

4 Q. So if we did this pursuant to the definition provided in
5 the operating agreement, we'd have to take Mr. Carter's
6 balance of 1.575 million for year end 2009, undistributed
7 profits. Do you see that?

8 A. I do.

9 Q. And we'd have to subtract the 1.697 million; right?

10 A. Correct.

11 Q. And that would leave him with a number under zero;
12 correct?

13 A. It would leave a negative, correct.

14 Q. A negative number. And if we did the same thing for
15 Mr. Barney, we'd have to take his \$590,000 shown here as year
16 end 2009, undistributed profits. Do you see that?

17 A. Yes.

18 Q. And we'd have to subtract out the \$579,000; right?

19 A. Right.

20 Q. And that would leave you with about \$10,000; wouldn't
21 it?

22 A. It would -- it would leave you with about 20,000, yes.

23 Q. And that number would be carried down throughout all of
24 your calculations; right?

25 A. Correct. Meaning nobody got any 2009 money.

1 Q. And the effective change, if we go to Page 71, the next
2 page here, the effective change, if I subtracted out that
3 \$579,000 from what you end up with here in year end 2016, do
4 you see that?

5 A. I do.

6 Q. If I subtracted that amount from the \$898,000 shown
7 here, I would end up with about \$318,000; right?

8 A. Right, because you miraculously evaporated ICAP from the
9 accounting books and records.

10 Q. Right. I would have taken out the ICAP proceeds, and I
11 would have not included it in my calculation for
12 undistributed profits because I was categorizing it as other
13 net profits; right?

14 A. And you are also assuming that there is no other way to
15 allocate it back to the members.

16 Q. That's right. I'm assuming under the operating
17 agreement that I have to do it the way it's said, right, the
18 way it's stated?

19 A. You're also assuming away any other means of allocating
20 the ICAP profits back in the accounting books and records and
21 from credit or by dividend pool, or any other way.

22 Q. And do you know any other way? Can you point me to any
23 other provision in the operating agreement that allows you to
24 include profits that are 901-C profits in the amount of
25 undistributed profits amounts? Are you aware of any such

1 provision in that operating agreement that allows you to do
2 that?

3 A. Sir, if you look at Section 901, allocation of profits
4 and losses, you could always allocate the entirety of the
5 ICAP transaction to the dividend allocation portion, and it
6 gets back to being allocated to the member's percentage
7 interest. And if you look to the comp plan, that would be a
8 firm credit basis.

9 Q. So show me where you are in 901.

10 A. I'm looking at 901-A, net profits from operation. And
11 I'm looking at now all of the profits for 2009, going through
12 75 percent being allocated through to the members.

13 Q. Right, Mr. Pakter. And if you do that, then, in fact,
14 you're treating all of those profits for the year as net
15 profits from operations; aren't you?

16 A. You asked me for another path, and I'm explaining to you
17 they would -- as -- as Ocean Tomo actually did. It took all
18 of the amounts for '09, allocated them, base net profits for
19 operation, allocated to two of the three of the line items as
20 member's percentage interest, but not the third. And you
21 asked me for another path to the answer, and I'm saying, yes,
22 there is another path; that is, all three of those line items
23 get allocated on a member's percentage interest, and that
24 would comply with the operating agreement.

25 Q. And to get there, to go down that other path, Mr.

1 Pakter, all of those profits from the year would have to be
2 net profits from operations; isn't that right?

3 A. In order not to make that understated accounting books
4 and records amount that you went through in your
5 hypothetical.

6 Q. In order to adhere to the operating agreement, in fact;
7 right?

8 A. Right. You asked me for this other path that would be
9 possible in the operating agreement. I believe I described
10 it.

11 Q. Okay. And if you wanted to go down that other path,
12 then you couldn't categorize any proceeds from sale of ICAP
13 as anything but net profits from operations; could you?

14 MR. LAYDEN: Objection, asked and answered.

15 THE COURT: Sustained.

16 BY MR. SPENCE:

17 Q. Let's look at the operating agreement and talk about
18 distributions now. And so we've talked about the change to
19 the calculation where we end up with Mr. Barney having about
20 \$13,000 as undistributed profits amounts. Let's talk about
21 how that would get distributed. And where I want to point
22 you to is Section 9.03. Are you there with me yet? Let me
23 know when you get there.

24 A. I'm pretty close to being there. Okay.

25 Q. Now, under 9.03, this is how distributions get made to

1 members; right?

2 A. Correct.

3 Q. In other words, this is how members get cash from Ocean
4 Tomo; right?

5 A. Correct.

6 Q. And if you look at 9.03-A, it provides that, "If money
7 is distributed." Do you see that?

8 A. Yes.

9 Q. "It's distributed in such aggregate amounts and at such
10 times as determined by the board in its sole discretion." Do
11 you see that?

12 A. I do.

13 Q. So you agree the board of managers have discretion to
14 decide how much is distributed in each year; right?

15 A. That's a layperson's reading of this. I'm not making a
16 legal conclusion.

17 Q. Well, when you wrote your expert report, did you assume
18 that that provision would give the board discretion to decide
19 how much could be distributed each year?

20 MR. LAYDEN: Your Honor, I'm just going to object
21 on the basis it's mischaracterizing the document.

22 THE COURT: Well, he can answer the question, if he
23 made such as an assumption. Overruled.

24 BY THE WITNESS:

25 A. The assumption that I made regarding distributions was

1 to take the actual distributions actually made in my
2 reconstruction. And, yes, I understand that the operating
3 agreement talks about discretion. The application of that
4 discretion is something that I believe to be a legal
5 conclusion, not something that I opine on.

6 Q. Do you also agree that, if you look at 9.03, it says,
7 that money is distributed, sorry, "If money is distributed,
8 it goes first to the members having a positive undistributed
9 profits amount." Do you see that?

10 A. I do.

11 Q. "Which distributions for the avoidance of doubt shall be
12 made on a pro rata basis." Do you see that?

13 A. I do.

14 Q. And that's pro rata in proportion, again, to the
15 positive undistributed profits amounts. Do you see that?

16 A. I do.

17 Q. Not pro rata in accordance with any sort of ownership at
18 Ocean Tomo; right?

19 MR. LAYDEN: Your Honor, I'm just going to object
20 on the basis there was an objection made by Mr. Spence during
21 direct to Mr. Pakter testifying about distributions. If he
22 is opening the door, I'll certainly go back into this on
23 redirect. But I just want to make my position clear. I
24 think he has opened the door by going into this topic, after
25 having made the objection and me having withdrawn my question

1 based on his objection.

2 THE COURT: I do recall that was -- I do recall
3 that objection during direct. Go ahead and do distributions
4 at your peril, that's fine.

5 BY MR. SPENCE:

6 Q. So that means after the tax distributions in 903B, a
7 member with a positive undistributed profit amount would
8 always receive distributions before a member who doesn't have
9 a positive undistributed profits amount; right?

10 A. One more time, please.

11 Q. Sure. So under 903B -- and maybe you didn't rely on
12 this at all. Did you rely on 903B for your expert report in
13 any way?

14 A. Well, and I don't know what you mean by rely. In my
15 calculations, I used the actual distributions made to the
16 members in my reconstruction.

17 Q. Did you consider whether those actual distributions were
18 made pursuant to the operating agreement?

19 A. I did not re-compute whether those distributions as
20 historically made complied or did not comply with 9.03 of the
21 operating agreement.

22 Q. Okay. So if I understood you correctly, then all you
23 really did was look at the actual distributions made by Ocean
24 Tomo; is that right?

25 A. My reconstruction only takes into account the actual

1 distributions made.

2 Q. Okay. Let's move on, then. We won't go into that topic
3 at all. Let's change topics now, and I want to ask you about
4 the audit that you performed, if I could.

5 Now, there was a royalty audit that you testified
6 about having conducted on behalf of Patent Ratings; right?

7 A. That's correct.

8 Q. And you were retained in 2002, 2012, rather?

9 A. Correct.

10 Q. And in 2012, Patent Ratings hired you to do royalty audit
11 of Ocean Tomo's royalties owed to Patent Ratings; right?

12 A. More specifically Mr. Layden engaged me on behalf of
13 Patent Ratings.

14 Q. Thank you for the clarification. And that engagement
15 resulted in you issuing a preliminary audit report on May 14,
16 2014; right?

17 A. That's correct.

18 Q. And I understand that there were two different phases to
19 your audit. Is that fair?

20 A. That's correct.

21 Q. The first phase was really looking at whether the
22 payments had been made correctly, based on a review of the
23 financial records. Is that an accurate description?

24 A. The accuracy of the reported payments was the first
25 phase, yes.

1 Q. So really focused on whether or not Ocean Tomo paid the
2 right amount of money?

3 A. And whether I could trace that reported amount of money
4 back through the accounting books and records.

5 Q. Okay. And then the second phase you really got into
6 looking more at the issue of whether or not Ocean Tomo had
7 paid on all the engagements that it should have paid on; is
8 that right?

9 A. I was looking for the completeness of revenue assertion.

10 Q. Okay. And Phase 2, rather than focus on those financial
11 documents that you talked about, your focus was really on --
12 at that point on the sampling of client engagements at Ocean
13 Tomo; right?

14 A. I was engaged in sampling under protest.

15 THE COURT: So it's clear, the issue on the audit
16 isn't necessarily the conclusion he reached as opposed to
17 whether or not he got the records that Mr. Barney thinks he
18 should have gotten under the license agreement; is that
19 correct?

20 MR. SPENCE: That's correct, your Honor.

21 MR. LAYDEN: Well, your Honor, I think that's
22 right. Although, I will note that in the past, Ocean Tomo
23 has argued that the audit showed there was very little
24 royalties owed. I think we moved past that point.

25 THE COURT: I think we have because there is an

1 expert report on that, and I'm assuming there would be
2 contrary expert testimony on that issue. But I don't know
3 that we need to focus on the -- unless you want to -- on the
4 numbers derived from that audit as opposed to the -- I
5 thought the only thing they're raising on the defense side is
6 we didn't get everything we're supposed to get.

7 MR. SPENCE: And that's what I'm about to get into,
8 your Honor. Exactly that point.

9 THE COURT: Very good. Okay. Fair enough. Sorry
10 to jump the gun.

11 MR. SPENCE: No problem.

12 BY MR. SPENCE:

13 Q. So let's look at some of the correspondence related to
14 that audit, if we could.

15 Let's start with Plaintiff's Exhibit 801. And,
16 again, we will pull these up on the screen. If you need to
17 look at them in paper form, please do so, but we will try to
18 move through this pretty quickly.

19 Do you recognize Plaintiff's Exhibit 801 as an
20 e-mail thread?

21 A. Would it be in the binder in front of me?

22 Q. It should be. Would you like to look at the paper
23 version of it?

24 A. Please.

25 THE COURT: It's in Volume 2.

1 BY MR. SPENCE:

2 Q. Would you like me to help you?

3 A. Yes, please. 802?

4 Q. 801, please.

5 A. Okay.

6 Q. So do you recognize this as an e-mail thread between you
7 and Ocean Tomo's general counsel, Mr. Lutzker?

8 A. It is one of many, yes.

9 Q. And the last e-mail on that thread I think is dated
10 September 10th of 2012; right?

11 A. Correct.

12 Q. And if we scroll down, I think it's to page -- do you
13 see the bates number on the bottom there, OTE-408165. Do you
14 see that?

15 A. I do.

16 Q. There, there is an e-mail from you to Mr. Lutzker, dated
17 July 26, 2012; right?

18 A. Correct.

19 Q. And that continues on to the next page, I think. It
20 looks like it ends there. In that e-mail, it says, "As you
21 know, Gould & Pakter Associates LLC was on site at Ocean Tomo
22 during the week of June 11, 2012." Do you see that?

23 A. I do.

24 Q. And you continue to say, "We performed certain financial
25 analyses directed towards verifying royalties due

1 Patent Ratings." Do you see that?

2 A. I do.

3 Q. Then you say, "At that time you provided us with the
4 following categories of information and/or documentation."
5 Right?

6 A. Correct.

7 Q. And then you go on to list these five categories of
8 information?

9 A. Correct.

10 Q. Do you see that? And four of those categories relate to
11 the documents that you really relied upon to provide your
12 opinion in Phase 1 of the audit; right?

13 A. In part, yes. They would be used in the second phase as
14 well.

15 Q. Sure. And so Category 1 is really the quarterly royalty
16 reports that you ended up relying upon; right?

17 A. Correct.

18 Q. And then Category B is the quarterly revenue reports
19 that you ended up relying upon; right?

20 A. It doesn't say that exactly.

21 Q. It's essentially the income ledger that you were relying
22 upon; right?

23 A. That's true.

24 Q. And then in Category C, this is the customer balance
25 detail reports that you are relying upon; right?

1 A. That's true.

2 Q. And that's -- the accounts receivable would be another
3 way of saying that. Is that fair?

4 A. That's fair.

5 Q. And then finally, in Category D, it's the invoices
6 themselves; right?

7 A. That's fair.

8 Q. And then you next write, "Since June 11, 2012, Gould &
9 Pakter has analyzed that data in some detail. We've
10 concluded that, but for a few minor items, we were able to
11 follow the audit trail and reconcile from Category A data to
12 Category B data." Do you see that?

13 A. I do.

14 Q. And then you go on to say, "However, we're unable to
15 follow the audit trail of and reconcile from Category B data
16 to Category C data to Category D data." Do you see that?

17 A. I do.

18 Q. And that refers to the way in which you did the first
19 part of this audit; right?

20 A. It refers to the first phase of the audit, yes.

21 Q. And during that first phase, you were essentially trying
22 to track from the royalty reports to the revenue to the
23 balance detail, the accounts receivable, and to the invoices;
24 right?

25 A. Correct.

1 Q. And then in this e-mail you say that you were able to
2 follow the trail from the Patent Ratings royalty statements to
3 Ocean Tomo's ledger; right?

4 A. I was able to go from A to B.

5 Q. From A to B; correct?

6 A. Correct.

7 Q. But you couldn't follow the trail from the ledger, which
8 is B, to the customer balance detail sheet or from customer
9 balance detail sheet to Ocean Tomo's invoices. Is that what
10 that says?

11 A. Correct. The accounting system broke down at that
12 point.

13 Q. So, in other words, you could go from A to B, but you
14 couldn't go from B to C or from C to D?

15 A. That's correct.

16 Q. And now let's look at OTE-408164 is the next page, going
17 forward. And here there is an e-mail from Mr. Lutzker to you
18 dated August 9, 2012; right?

19 A. Correct.

20 Q. And he explains that he provides -- he explains, I
21 guess, and he provides a sample of documents on how to
22 reconcile the documents in Category, B, C, and D; right?

23 A. He understands -- yes, what he thought would allow a
24 reconciliation of B, C and D.

25 Q. He is trying to help you to do that tracing that you

1 earlier told him you weren't able to do; right?

2 A. He was endeavoring to meet his responsibilities to show
3 a solid order trail within Ocean Tomo's accounting books and
4 records.

5 Q. So you agree at this point he is assisting you to do the
6 audit; is that right?

7 A. At this point, he is doing what he was obligated to do.

8 Q. He is cooperating with you; right, Mr. Pakter?

9 A. At this point, he was providing information which didn't
10 pan out to be able to reconcile both by my staff who spent
11 the time, and when I asked Mr. Lutzker to have his staff do
12 it, they were unable to do it either.

13 Q. Okay. Well, we'll flip through that correspondence and
14 we'll get to that.

15 So in addition to offering some documents and
16 offering an explanation, he also offers a procedure for
17 verifying that you have everything you need; right?

18 A. He does offer an approach.

19 Q. And he says, specifically, "We will provide you with a
20 list of all billable matters, other than auction, by year,
21 for 2007 to 2011." Do you see that?

22 A. I see.

23 Q. And he goes on to say, "Subject to dealing with any
24 confidentiality and/or protective order issues, we will
25 provide you with reasonable access to client deliverables and

1 other materials reasonably necessary for your verification
2 for a reasonable sample set drawn from that list." Do you
3 see that?

4 A. I do.

5 Q. And if we go to the e-mail just before that, you end up
6 responding to him on September 5th; right?

7 A. I do.

8 Q. And in that e-mail, you say that you're unable to
9 reconcile other transactions using the same method; right?

10 A. I was unable to reconcile Categories B, C and D, and nor
11 was Mr. Lutzker, or his accounting staff.

12 Q. Right. You also thank him for the explanation that he
13 provided; right?

14 A. We endeavored to be cordial during the process.

15 Q. And Ocean Tomo was always cordial during this process;
16 right?

17 A. Cordialities doesn't mean responsiveness or accuracy or
18 providing all that you're supposed to.

19 Q. Understand your position, Mr. Pakter, but they were
20 cordial; weren't they?

21 A. I hope we were cordial during the process.

22 Q. And you also said that the documents that you provided
23 actually helped to reconcile some of these categories for at
24 least one of the issues you were having; right?

25 A. There was a little bit of help, yes.

1 Q. And then Mr. Lutzker responds to that e-mail on
2 September 10th of 2012; right?
3 A. He does.

4 Q. And, again, he offers to provide the reconciliations of
5 Categories B, C and D for you. Do you see that?
6 A. He is happy to consider it.

7 Q. And he is also considering providing the listing of
8 matters for your sampling; right?
9 A. Mr. Lutzker was always prepared to consider whatever I
10 wrote.

11 Q. And not just consider, actually sent you documents from
12 time to time; didn't he?

13 MR. LAYDEN: Objection, argumentative, your Honor.

14 THE COURT: Overruled. But could you put up on the
15 screen for my benefit the exact section of the license
16 agreement that deals with the requirement of cooperation on
17 an audit? Is there -- I assume there is such a section, and
18 I'd like to have it up there, unless this is an amorphous
19 issue of cordiality and cooperation. But I'm hoping --

20 MR. LAYDEN: Your Honor?

21 THE COURT: -- it's something specific.

22 MR. LAYDEN: I'm sorry to interrupt, your Honor. I
23 don't know if you have the exhibit number handy. It's DX-3.
24 It's the license agreement, if it's helpful to pull that up.

25 THE COURT: Yeah, put it up on the screen and then

1 go to the section that deals with -- it will be a good way
2 to -- all right. This is Exhibit 3, Defense 3; right?

3 MR. LAYDEN: That's three, yes, your Honor.

4 THE COURT: It's section what?

5 MR. SPENCE: 4.5. I think it's C; is that right?

6 MR. LAYDEN: Yes, that's right.

7 THE COURT: All right. Just give me a moment to
8 read it. So it is -- the operative language is, "Licensee
9 agrees to permit licensor to inspect or audit licensee's
10 records from time to time provided reasonable notice must be
11 given. And it has got to be done during normal business
12 hours and only to the extent necessary to determine or verify
13 any royalty payments required hereunder; and agrees not to
14 conduct more than one inspection or audit each calendar year.

15 How do you suggest I'm supposed to judge whether or
16 not Ocean Tomo -- what's the standard? Because it seems as
17 if there is just an agreement to permit audit and inspection
18 of records from time to time. I'm not -- I'm assuming you're
19 not quibbling about reasonable notice or number of audits. I
20 hope you're not. If you are, then we have even more issues.
21 But what is the standard by which I ought to be judging the
22 fulsomeness of Ocean Tomo's response to the requests of
23 Mr. Packer?

24 MR. LAYDEN: Your Honor, I would submit that the
25 argument we made, and I think what the standard should be, is

1 whether we were allowed to inspect or audit the records. And
2 the point that we have tried to make through the evidence,
3 and I think what the evidence will show, is that there were
4 records that we requested to inspect in audit that we were
5 not provided, and that was the breach of that provision.

6 THE COURT: And what if Ocean Tomo didn't think the
7 records you were requesting were -- in their judgment were
8 necessary for your auditor to do what he was trying to do?
9 This just says, inspect or audit records from time to time.
10 Nothing about in the discretion of the licensor or the
11 discretion of the licensee. So your position is he needed
12 more, it was his testimony, he needed more than he had, and
13 that Ocean Tomo should have given him more records than they
14 did.

15 MR. LAYDEN: And, your Honor, the larger point here
16 and the way this fits into the rest of the case is that this
17 was just -- this was something Mr. Pakter was trying to do in
18 connection with the audit right, and what we believe the
19 discovery issue has shown is that in fact, you know, the
20 reason these records weren't provided is because they
21 actually showed a lot of royalties were owing. So it fits
22 into the larger pattern of royalties being owed, and we think
23 that that is -- so, your Honor, we're not saying that --

24 THE COURT: All right. I'll give Mr. Spence a
25 chance to respond. But your claim is you, Ocean Tomo, owe

1 me, Jonathan Barney, some royalties.

2 MR. LAYDEN: Actually Patent Ratings, your Honor,
3 but, yes.

4 THE COURT: Or Patent Ratings owe some royalties.

5 MR. LAYDEN: Yes. Correct.

6 THE COURT: This is just flavor to the argument
7 that they didn't give me enough records so I can determine.
8 It's -- you're arguing this is circumstantial evidence that
9 they didn't pay the correct amount of royalties to
10 Patent Ratings.

11 MR. LAYDEN: It's partly that, your Honor. It's
12 also there we are, as you know, we're seeking termination of
13 the license agreement under the declaratory relief, and this
14 is one of the breaches that supports that.

15 THE COURT: This is an enumerated breach that
16 allows for --

17 MR. SPENCE: Not just a breach, they allege it's a
18 material breach, your Honor.

19 MR. LAYDEN: In the notice to breach, your Honor,
20 it is. And then there is also, part of the damages we are
21 seeking is the cost of the audit, small part, but it's the
22 cost of the audit. So that's how it fits in, your Honor.

23 THE COURT: Okay. And Mr. Spence?

24 MR. SPENCE: So unfortunately, with that position,
25 we're forced to go through a series of correspondence because

1 what this correspondence shows is that this preliminary
2 audit, as they call it, took place over about two years and
3 he --

4 THE COURT: But my -- I agree, Mr. Spence, and here
5 is the question. Are there any of the exhibits you intend to
6 use that are different than the ones already used by --

7 MR. SPENCE: Yes.

8 THE COURT: -- the defense?

9 MR. SPENCE: They show our reasonableness because
10 they've obviously cherry-picked ones to try to show that we
11 were somehow not providing documents. And the reality is the
12 opposite is true. No matter what we provided, they wanted
13 more. And it got to the point where you get to the end of
14 this correspondence, the very last e-mail from Mr. Pakter is,
15 not only do I want everything related to Issue A, but I want
16 everything to prove a negative. So, at that point, he
17 essentially wants all of Ocean Tomo's documents. And we
18 don't think that's reasonable, nor is it a material breach to
19 deny that.

20 THE COURT: All right. Can't, though, I simply
21 take the stack of e-mails that defense has used and the
22 additional ones you want to use, some of which are common,
23 but you have additional ones, read them myself, make a
24 determination on that, as to -- read them from start to
25 finish, determine whether or not one side -- PatentRatings is

1 being picky or you're being obstructive?

2 MR. SPENCE: Absolutely, your Honor.

3 THE COURT: And do that without having to basically
4 have a witness read e-mails.

5 MR. SPENCE: I would invite and appreciate that.

6 THE COURT: And then whatever inference, whether
7 that's -- whether I find there that's a material breach and
8 ends up being a basis to cancel the license agreement, I can
9 make that determination based on arguments. I can use it as
10 possible circumstantial evidence to say you didn't pay
11 Patent Ratings what they should have paid, if that's going to
12 be the argument. And I just don't see, if Mr. Lutzker, who
13 is -- sounds like the person on the opposite end of most of
14 these e-mails isn't going to testify, all we really have
15 is -- I can read these e-mails as well as anybody. Well, as
16 well as some people.

17 MR. LAYDEN: I think it's your reading that's going
18 to matter, whether it's better than somebody else's or not,
19 but.

20 THE COURT: But, anyway, Mr. Spence, you know, I'm
21 just thinking that may be a way to get around this issue
22 because we're not even there to the big royalty issue, which
23 is a complicated issue, as I listened to the testimony
24 yesterday. And I fear that this may be an area you can rely
25 on me just to look it over and then make your arguments.

1 MR. SPENCE: Absolutely, your Honor.

2 THE COURT: All right. If that's acceptable, why
3 don't you move on to the royalty issues itself. At some
4 point, move to admit the additional exhibits, you don't have
5 to do it now, but move to admit the additional exhibits, and
6 then both sides can tell me, look at the stack, and that will
7 be the audit -- or the audit issue that I can look at. Does
8 that sound reasonable to you?

9 MR. SPENCE: It does sound reasonable, your Honor.

10 THE COURT: How about the defense?

11 MR. LAYDEN: It's certainly fine, your Honor. You
12 know, if Mr. Spence wants to either himself or have one of
13 his colleagues just send me a list of the exhibits they seek
14 to admit, I assume they're all e-mails between Mr. Lutzker
15 and Mr. -- I'm sure I won't have a problem, but I will
16 certainly let him know.

17 THE COURT: Good enough.

18 MR. SPENCE: There are also very small number of
19 deposition designations on this point. We can just designate
20 and provide those to your Honor.

21 THE COURT: That's fine. This seems like a good
22 way to handle this particular issue. All right. Please
23 proceed.

24 MR. SPENCE: If I could take a short break, your
25 Honor?

1 THE COURT: All right. Let's take a ten-minute
2 break so you can reorganize and launch right into what I
3 hope, I assume, is your royalty cross-examination.

4 MR. SPENCE: Correct. Yes.

5 THE COURT: Okay. Ten minutes, and we will be back
6 to do that.

7 (Recess taken from 3:38 PM to 3:50 PM.)

8 BY MR. SPENCE:

9 Q. Mr. Pakter, let's go back to -- let's go to your report,
10 which is DX-609, please. Do you need help with that, or do
11 you have it out?

12 A. I don't have it. Can you tell me if it's in Volume 1 or
13 2?

14 Q. DX-609.

15 A. Okay. I'm there.

16 Q. Okay. So this is now the second of two reports that you
17 provided in this litigation; right?

18 A. Correct.

19 Q. And if you would turn with me to Page 17, here you
20 provide a number of definitions; right?

21 A. Correct.

22 Q. First you provide a definition for external data sales.
23 Do you see that?

24 A. I do.

25 Q. And then below that there is a definition for external

1 data usage; right?

2 A. Correct.

3 Q. And both of those definitions come from the 2007
4 amendment; right?

5 A. That is correct.

6 Q. Now, right before you provide those definitions, you
7 write above, quote, "My basis for determining whether the
8 royalty rate was 25 percent for external data sales or
9 13.25 percent for external data usage was based on my reading
10 and understanding of the corresponding definitions provided
11 in Section 4.3 of the amendment; right?

12 A. Correct.

13 Q. And then you provide those definitions below?

14 A. Correct.

15 Q. And here you say, "External data sales means any sale of
16 PatentRatings analysis by licensee." That's Ocean Tomo;
17 right?

18 A. Yes.

19 Q. "That are actually delivered." Do you see that?

20 A. Yes.

21 Q. "To licensee's external clients or customers." Right?

22 A. Correct.

23 Q. And, similarly, if you look below that, you say, "An
24 external data usage means any usage or inclusion of
25 PatentRatings analysis or any derivatives thereof by licensee

1 which facilitates the provision of information of reports,
2 again, actually delivered to Ocean Tomo's external clients or
3 customers." Right?

4 A. Yes.

5 Q. That phrase, "actually delivered to licensee's external
6 clients or customers," is present in both definitions;
7 correct?

8 A. It is.

9 Q. And so that you would agree with me, then, if nothing is
10 actually delivered to Ocean Tomo's customers or clients, then
11 it wouldn't be an external data sale or an external data
12 usage; right?

13 A. And I believe that is ultimately a legal conclusion.

14 THE COURT: Well, did you include -- did you
15 analyze, when you determined the deficiencies in the
16 royalties, was it part of your analysis on whether or not any
17 of these work products of Ocean Tomo were actually delivered
18 to clients?

19 THE WITNESS: I did take into account delivered to
20 clients. But due to the incomplete nature of the production,
21 I also assumed that if a customer paid for an engagement that
22 they received delivery of products or advice or documents.

23 THE COURT: Okay. All right. Proceed. Please
24 proceed.

25 BY MR. SPENCE:

1 Q. When -- in fact, Mr. Pakter, you gave deposition
2 previously in this case; correct?

3 A. I did.

4 Q. And you testified under oath, and at that deposition,
5 did I ask you this question and did you give this answer?

6 Question: "Let's go back to the idea of external
7 data sales. Is it your understanding that to be an external
8 sale of data you have to actually have a PatentRatings report
9 subscription, license, or similar report actually delivered
10 to the Ocean Tomo client?"

11 Answer: "It would appear to me that actual
12 delivery is an element of the definition of external data
13 sales, as I read that as an accountant. But it's not a legal
14 conclusion."

15 Question: "So, in other words, your understanding,
16 as an accountant, is that if Ocean Tomo were to actually
17 deliver an IPQ score to an Ocean Tomo client, that would be,
18 in your understanding, an external data sale; is that right?"

19 Answer: "An actual delivery of a report, including
20 an IPQ score would, from an accounting point of view, appear
21 to me to meet the standard of an external data sale."

22 You were asked those questions and you gave those
23 answers; right, Mr. Pakter?

24 MR. LAYDEN: Your Honor, I'm going to object. I
25 don't have a page, a line he is referring to. I think it's

1 improper impeachment. But I just note that for the record.

2 THE COURT: What?

3 MR. LAYDEN: I don't know what he is reading from.
4 He hasn't given a page, a line, I don't have it in front of
5 me, and it's improper impeachment anyway. But I will just
6 note that for the record. Mr. Pakter can certainly answer
7 the question.

8 MR. SPENCE: I'm trying to streamline the process,
9 your Honor, but I'm happy to go through a formal impeachment,
10 if you'd like.

11 THE COURT: Well, you should always give him a page
12 and line. You don't need to do it here. I'm assuming you
13 read it accurately. But for counsel's sake so he can make
14 sure it's in context, the next impeachment you do, give him a
15 line and a page.

16 Okay. Do you recall saying that?

17 THE WITNESS: I do.

18 THE COURT: Okay.

19 BY MR. SPENCE:

20 Q. And also in these definitions you see that in the
21 definition for external data sales it says, "for the
22 avoidance of doubt . . ." do you see that?

23 A. I do.

24 Q. "External data sales shall not mean the internal use of
25 PatentRatings analysis by Ocean Tomo, even if such internal

1 use facilitates the provision or sale of consulting, auction,
2 or other services or products to Ocean Tomo's clients or
3 customers." Do you see that?

4 A. I do.

5 Q. And then also for external data usage, it says, "For
6 avoidance of doubt, external data usage shall not mean the
7 internal use of Patent Ratings analysis, such as currently
8 used by Ocean Tomo as part of its services known as expert
9 services, appraisals, investments, risk management, and/or
10 corporate finance." Do you see that?

11 A. You have read it correctly.

12 Q. And both of those definitions include internal use;
13 right?

14 A. I don't understand that question.

15 Q. Both of those definitions include the term internal use;
16 right?

17 MR. LAYDEN: Objection, form, your Honor.

18 THE COURT: The words "internal use" are in both.

19 I acknowledge that.

20 BY MR. SPENCE:

21 Q. So you understand, don't you, Mr. Pakter, that if it's
22 an internal use of Patent Ratings data or analysis, then it
23 isn't royalty-bearing; right?

24 A. So that is ultimately a legal conclusion for the court
25 to reach. I don't believe that I have any calculation which

1 refers to internal use in my calculations.

2 Q. All right. So, in other words, your understanding as an
3 accountant is that an internal use isn't royalty-bearing; is
4 that fair?

5 A. It's my understanding as an accountant that an Ocean
6 Tomo customer does not pay Ocean Tomo for Ocean Tomo's
7 internal use of Patent Ratings analysis.

8 Q. And when you attempted to calculate the royalties owing
9 from Ocean Tomo to Patent Ratings, if there was anything that
10 was an internal use, you didn't include a royalty on that;
11 right?

12 A. I can only tell you I have based it on the revenue
13 actually collected by Ocean Tomo, and I'm assuming that no
14 customer of Ocean Tomo paid Ocean Tomo for its internal use
15 of Patent Ratings analysis.

16 Q. Right. But you reviewed a variety of engagement letters
17 in your work; right?

18 A. I reviewed a significant amount of Ocean Tomo engagement
19 letters to its customers, yes.

20 Q. And you reviewed a significant number of client
21 deliverables; isn't that right?

22 A. I reviewed thousands of pages of clients' deliverables
23 from Ocean Tomo to its customers.

24 Q. And invoices; right?

25 A. And invoices and payments and revenues from those

1 customers paying Ocean Tomo, yes.

2 Q. And a significant number of other associated documents
3 associated to those engagements to those client deliverables;
4 right?

5 A. Yes.

6 Q. And so when you did your review of those, if you, as an
7 accountant, determined that something was an internal use of
8 PatentRatings information, then you did not apply royalty;
9 did you?

10 A. I only applied a royalty to revenue received from an
11 external customer. I don't see how the external customer
12 would be paying Ocean Tomo for Ocean Tomo's internal use.

13 Q. Okay. So, in other words, when you prepared your
14 opinion, you did work to determine whether or not Ocean Tomo
15 actually delivered PatentRatings analysis to a customer;
16 right?

17 A. I did work to determine the revenues that Ocean Tomo
18 received from its external customers, determined whether they
19 were royalty-bearing and the royalty rate.

20 Q. And to determine whether or not something was
21 royalty-bearing, Mr. Pakter, you did work to determine
22 whether Ocean Tomo actually delivered PatentRatings analysis
23 to a customer; right?

24 A. Part of my work considered the delivery of a document
25 because so much of the document production was incomplete or

1 drafts. I also had to rely on the collection of revenue from
2 an external Ocean Tomo client.

3 Q. Okay. And to determine whether or not Ocean Tomo
4 actually delivered PatentRatings scores, reports or other
5 products to an Ocean Tomo customer, you base that on an
6 accountant's read of the information and/or documents
7 assembled by and/or provided to you; right?

8 A. Including but not limited to the revenue proceeds from
9 those engagements.

10 Q. And, furthermore, if the record indicated that a
11 document was addressed to an Ocean Tomo client, then you
12 consider that to be reasonably appropriate to regard it as a
13 delivery; right?

14 A. And payment was received.

15 Q. All right. So, in other words, you were looking to see
16 if a record indicated that a document was addressed to an
17 Ocean Tomo client; right?

18 A. And payment was received.

19 Q. And then you were looking to see if there was an e-mail
20 interchange between Ocean Tomo client and Ocean Tomo
21 personnel; right?

22 A. And payment was received.

23 Q. And you assume that if a customer paid, then a product
24 was actually delivered; right?

25 A. From an accountant's point of view, I assumed payment

1 equated delivery of goods and services.

2 Q. Okay. So those were the three things you did as you
3 were trying to determine whether or not a royalty was owed.
4 You looked to see was something actually delivered, you
5 looked to see was there an e-mail interchange between Ocean
6 Tomo and a client, and you looked to see whether any
7 customers had paid; right?

8 A. You're picking three items out of a very much longer
9 process that I went through. It's almost like you started in
10 the middle. So it's very difficult for me to answer that
11 question.

12 Q. Well, your first step -- I'm sorry, go ahead. I didn't
13 mean to cut you off.

14 A. I had a process for this. My process included reviewing
15 the amendment to the license agreement. It included
16 reviewing descriptions of PatentRatings analysis and
17 PatentRatings tool. It included collecting a body of
18 knowledge, obtaining understanding of what a deliverable was.
19 Some document sets were different from other document sets,
20 and I looked at the totality of the document set. I learned
21 what the process was. I learned how Ocean Tomo described it,
22 and I looked at the revenues collected. As part of that
23 process, yes, I looked at e-mails, engagement letters,
24 deliverables, some complete and acknowledged by customers,
25 some in draft.

1 Q. Okay. When you saw those documents and you saw a
2 reference to Patent Ratings in some way, then that focused
3 your investigation further; right?

4 A. The appearance of Patent Ratings tools and/or
5 Patent Ratings analysis informed my judgment whether the
6 engagement was royalty-bearing and the rates to be applied to
7 the revenues.

8 Q. Okay. So you made this initial determination that there
9 is some indicia on these documents related to Patent Ratings.
10 Is that fair?

11 A. That was part of my process. That's fair.

12 Q. And then once you made that initial determination that
13 there is some indicia in these documents, then you looked
14 further to see were those documents actually delivered to an
15 Ocean Tomo customer, or client; right?

16 A. Including looking to see if a payment was made.

17 Q. Correct. And also including to see if there was an
18 exchange of e-mail between Ocean Tomo and the client in that
19 engagement; right?

20 A. That was a factor, but I gave greater weight to the
21 collection of revenue.

22 Q. Okay. You didn't ask any Ocean Tomo customers or
23 clients whether they had actually used any Patent Ratings
24 product or service; right?

25 A. I did not interview any Ocean Tomo customers.

1 Q. And you don't remember asking Mr. Barney if a
2 PatentRatings analysis had actually been delivered to an
3 Ocean Tomo client; right?

4 A. From time to time Mr. Barney was consulted about aspects
5 of the body of knowledge relating to whether an engagement
6 was royalty-bearing or not.

7 Q. Did you ever testify differently?

8 A. To the best of my knowledge and belief, I would have
9 described to you the same process during my deposition as I'm
10 testifying to the court today.

11 Q. If we could pull up Mr. Pakter's May 19, 2017,
12 deposition, Page 203, please.

13 If you look with me at Line 10. Do you see that,
14 Mr. Pakter?

15 A. Yes.

16 Q. Do you remember me asking you this question and you gave
17 this answer?

18 Question: "Did you ask Mr. Barney whether or not a
19 PatentRatings analysis -- "

20 THE COURT: I think the wrong one is up on the
21 screen.

22 BY MR. SPENCE:

23 Q. Sorry, this should be the June 6, 2017, deposition. I
24 gave you the wrong date.

25 Thank you. Lines 10 to 14.

1 Mr. Pakter, did I ask you this question, and did
2 you give this answer?

3 Question: "Did you ask Mr. Barney whether or not a
4 PatentRatings analysis had been delivered by Ocean Tomo to
5 one of its customers or clients?"

6 Answer: "I don't recall one way or the other, as I
7 sit here today."

8 Did I ask you that question, did you give that
9 answer?

10 A. Yes, you asked it, and, yes, I gave that answer.

11 Q. And so other than looking at the documents that we just
12 discussed, you didn't do anything to verify whether or not
13 PatentRatings analysis was actually delivered to the
14 customer; did you?

15 MR. LAYDEN: Objection. Mischaracterizes his
16 testimony.

17 THE COURT: Sustained.

18 BY MR. SPENCE:

19 Q. For external data usage, you considered a consulting or
20 a valuation report that indicated that Ocean Tomo had used
21 PatentRatings product in some way to be an external data
22 usage; didn't you?

23 A. I didn't follow that question.

24 MR. LAYDEN: Objection, form, your Honor.

25 THE COURT: The witness says he needs to have the

1 question rephrased.

2 BY MR. SPENCE:

3 Q. For external data usage, you considered a consulting or
4 a valuation report that indicated that Ocean Tomo had used
5 PatentRatings analysis in some way as an external data usage;
6 right?

7 MR. LAYDEN: Objection, form.

8 THE COURT: Overruled. If the witness understands.

9 THE WITNESS: I don't, your Honor.

10 THE COURT: Okay. It looks like you have to
11 rephrase it, Mr. Spence, or break it up; or if you're leading
12 to an answer in a deposition, maybe just go right to the
13 deposition.

14 BY MR. SPENCE:

15 Q. So you considered, Mr. Pakter, an example of external
16 data usage to be where Ocean Tomo personnel provides a
17 consulting or valuation report to one of its customers or
18 clients and reflects within the documents that it used
19 PatentRatings analysis as part of its work; right?

20 A. I'm sorry, I don't understand your question.

21 Q. What don't you understand about it?

22 A. You said external data sales?

23 Q. Sure. With respect to external data -- if I did, I
24 misspoke. With respect to external data usage, you provided
25 as an example of external data usage, where Ocean Tomo

1 personnel provides a consulting or valuation report to one of
2 its customers or clients and reflected within the document
3 that it used PatentRatings analysis as part of its work;
4 right.

5 A. I can see having said that, yes.

6 Q. That was one of the examples that you considered to be
7 external data usage; right?

8 A. Yes, there is a consulting report by Ocean Tomo and it
9 uses PatentRatings analysis. That is an example.

10 Q. And so when you did your analysis for determining
11 whether there was an external data usage, it didn't matter
12 whether or not Ocean Tomo had actually provided the
13 PatentRatings analysis to the customer; right?

14 A. It's my understanding that the test under the amendment
15 is the usage or inclusion of PatentRatings analysis which
16 facilitates the provision of information to the customer.

17 Q. In other words, it didn't matter whether Ocean Tomo
18 actually delivered that PatentRatings analysis to the
19 customer; right?

20 MR. LAYDEN: Objection, asked and answered.

21 THE COURT: Overruled.

22 BY THE WITNESS:

23 A. I would have looked to see if there was delivery of the
24 PatentRatings analysis. I would have looked to see if there
25 was use of the PatentRatings analysis. That was part of my

1 process.

2 Q. But in at least some instances it didn't matter to you
3 whether or not the Patent Ratings analysis was actually
4 delivered to the customer; right?

5 MR. LAYDEN: Your Honor, now I'm going to object,
6 asked and answered.

7 THE COURT: Sustained.

8 MR. SPENCE: Well, I don't think he has answered
9 the question, your Honor.

10 THE COURT: He said earlier, I understand him to
11 say that, yes, he did consider whether it got delivered and
12 he analyzed whether the client paid for it, whether there was
13 e-mails reflecting the fact of delivery. There were some
14 other evidence of delivery, among other factors. That's how
15 I understand it. If you have a point where he has given an
16 inconsistent statement on that, I don't know what your expert
17 is going to say. If your expert is going to say that there
18 were a number of, or some number, of these reports that never
19 got delivered, so be it.

20 You know, I read this definition of it has got to
21 get delivered. If they worked on it and it didn't go to a
22 client, then there shouldn't be a royalty charged on it. If
23 they worked on it and it did go to a client, there should be
24 a royalty charged on it. And whether it's 25 percent or
25 13-and-a-quarter percent, or the so-called split amount is a

1 matter I have to determine. And if your, you know, Mr.
2 Pakter has -- has a set of charts on how he came up with
3 this, and I'm assuming your expert is going to say some of
4 these didn't get delivered, and if they didn't get delivered,
5 I don't think anybody should be paying on it. I don't know
6 why anybody would pay. I don't know why you would pay a
7 royalty, Ocean Tomo would pay a royalty, to Mr. Barney if
8 they didn't get paid by a client for it, it didn't get
9 delivered to a client. Not get paid, but didn't get
10 delivered to a client.

11 That's how I view the evidence. If I'm wrong on
12 that, correct me, and then, you know, we will go through
13 witnesses. But if that's where -- you know, where I'm at.
14 And if you need to ask further questions on this in light of
15 where I'm at, you know, then go ahead.

16 BY MR. SPENCE:

17 Q. So Mr. Pakter, when you said that something had to be
18 delivered for it to be an external data usage, what is it
19 that had to be delivered?

20 A. I don't recall saying it had to be delivered.

21 Q. So, in other words, it's your position that a royalty
22 could be owing even if no PatentRatings analysis was
23 delivered to the customer or client?

24 A. I'm going back to what it says here. "External data
25 usage means any usage or inclusion of the PatentRatings which

1 facilitates the provision of information or reports actually
2 delivered to external customers." And I regard payment for
3 those as payment for the provision of information or reports.
4 A client can get information even if they don't get a
5 document.

6 Q. So that's the issue I'm trying to get to. Because, in a
7 minute, we're going to go through a number of examples. And
8 before we look at those examples, I'm trying to figure out
9 how you made your determination as to whether or not a
10 royalty was owing. Do you understand that?

11 MR. LAYDEN: Your Honor, objection, form. It's
12 argumentative.

13 THE COURT: Yeah, just get to the questions.

14 MR. SPENCE: I'm trying to understand the basis for
15 this expert's opinion. He says certain things are
16 royalty-bearing and certain things aren't, and I can't
17 frankly determine how he made those determinations. And
18 before I show him examples, I want to know what the rules
19 were that he applied.

20 THE COURT: Well, sir, did you assess royalties,
21 say that royalties were owed, due and owing, for any reports
22 that you found were not delivered?

23 THE WITNESS: I have occasions when there is a
24 draft report. That is the only document available to me.
25 And I have revenue where the Ocean Tomo customer pays Ocean

1 Tomo.

2 THE COURT: All right. So the point is, you
3 either -- you assessed royalties, if it was delivered, or if
4 all you have is a draft, you use the fact of revenue being
5 paid as some corroborative evidence for the fact that a final
6 got delivered -- final report got delivered.

7 THE WITNESS: Or consulting information, yes, your
8 Honor.

9 THE COURT: All right. Okay, well, Mr. Spence, I'm
10 sorry, were you able to hear that interchange?

11 MR. SPENCE: Just give me a second, your Honor.

12 THE COURT: Yeah go ahead. Take a look at it.

13 MR. SPENCE: So I think the issue that we're still
14 struggling with is we don't understand what it is that had to
15 be delivered in order for it to be considered royalty-bearing
16 within Mr. Pakter's report.

17 THE COURT: All right. Well, ask your questions.
18 I hesitate sometimes to interfere with --

19 MR. SPENCE: Sure.

20 THE COURT: -- a set of questions of people who
21 have studied this longer than I have. And I don't want to
22 interrupt your flow. I just, at some points where it's not
23 relevant to me or it's not important to me, I'd rather tell
24 you where it's at -- where I'm at on it, and you can correct
25 me if I'm misunderstanding the relevance or importance of a

1 particular issue.

2 MR. SPENCE: Sure.

3 THE COURT: That's why I interfere. Maybe. Maybe
4 I shouldn't.

5 MR. SPENCE: It's helpful, your Honor. You're
6 invited to help anytime.

7 BY MR. SPENCE:

8 Q. Mr. Pakter, how did you determine whether or not the
9 thing, the item that was delivered met the definition under
10 the 2007 amendment?

11 A. As an accountant, I give greatest weight to payment
12 received, revenue received from an Ocean Tomo customer. If
13 an Ocean Tomo customer paid Ocean Tomo when there was use or
14 inclusion of Patent Ratings in a report or draft report, I am
15 making what I believe to be a reasonable assumption that the
16 customer was provided with information or reports that led to
17 them writing a check to Ocean Tomo for the engagement.

18 Q. Okay. So you did so based on that check being written
19 but not on the use or inclusion of the Patent Ratings report
20 actually going to the client; is that right?

21 MR. LAYDEN: Objection. Mischaracterizes his
22 testimony.

23 THE COURT: Yeah, he just gave a long paragraph of
24 what he considered, and you're condensing it to a single
25 sentence. And you can ask it again, but he is going to give

1 you the paragraph again.

2 BY MR. SPENCE:

3 Q. I'm just trying to understand -- you had to make a
4 determination, right, Mr. Pakter?

5 MR. LAYDEN: Objection, form.

6 THE COURT: Overruled.

7 BY THE WITNESS:

8 A. Yes, I had to make a determination on an
9 engagement-by-engagement basis.

10 BY MR. SPENCE:

11 Q. Okay. So let's say that Ocean Tomo studied some of this
12 PatentRatings data regarding a client and then Ocean Tomo
13 subsequent to studying that data advised the client and
14 requested a fee for that advice. Is that an external data
15 use, as the way you understand it?

16 A. So I think that would meet the definition read in the
17 following way: "External data usage means any usage or
18 inclusion of the PatentRatings analysis which facilitates the
19 provision of information actually delivered to the external
20 customer."

21 Q. So I think that helps. So it's your understanding that
22 anytime someone at Ocean Tomo considers any information from
23 the PatentRatings system, and subsequently provides any kind
24 of a service to a client in exchange for a fee, that's an
25 external data usage, in your mind; is that right?

1 MR. LAYDEN: Objection. Mischaracterizes his
2 testimony.

3 THE COURT: Overruled. He can correct it.

4 BY THE WITNESS:

5 A. I did not say that.

6 BY MR. SPENCE:

7 Q. Explain, then, because I'm not understanding,

8 Mr. Pakter.

9 A. I regard each engagement as a body of knowledge.
10 Included in the body of knowledge that I have for each
11 engagement is the fact that revenue was collected or, in a
12 rare instance, there was an accounts receivable reflected. I
13 then go on to look at the engagement letter for that
14 particular engagement to see whether it refers to
15 PatentRatings analysis or usage of or sale of or derivatives
16 of the patent rating. After that, I am faced with the
17 document set, which I received. Some of that document set
18 includes a final expert report. I don't know whether an
19 expert report was delivered or whether somebody provided the
20 testimony to the court. Sometimes I see draft reports.
21 Sometimes I see a draft Excel. Sometimes I see an e-mail
22 indicating that an Ocean Tomo customer accessed the system.
23 I have to make a body of knowledge decision based on the body
24 of knowledge that I have and which I provided in the context
25 accompanying my report.

1 Q. How did you do so reliably?

2 A. I did it primarily based on the revenue, and I did it
3 following the following rule. The rule that I followed was,
4 former Rule 201, Paragraph D: "Obtain sufficient relevant
5 data -- "

6 THE COURT: Where are you reading from?

7 THE WITNESS: I'm sorry, your Honor, Page 3.

8 THE COURT: Of your report?

9 THE WITNESS: Page 3 of my report at Footnote 2.
10 It's the AICPA Code of Professional Conduct and Bylaws,
11 Section ET1.300.001, formerly known as Rule 201.

12 THE COURT: All right. There is no need to read
13 it. I can read it.

14 THE WITNESS: Thank you.

15 BY MR. SPENCE:

16 Q. Okay. So I understand the amount of rigor that you
17 attempted to apply, but how did you make a reasonable
18 determination from a substantive point of view? What were
19 the factors? What were the things that you were looking for?

20 A. The factors and things that I was looking for included
21 but not limited to the revenue that was collected --

22 THE COURT: Okay. Stop, please. I've heard this.
23 I've heard this. Mr. Spence, sometimes expert witnesses will
24 not agree with you. That happens. In fact, rarely will they
25 agree with the cross-examiner.

1 MR. SPENCE: I'm actually asking him to agree, your
2 Honor.

3 THE COURT: If this is truly -- let me finish.

4 MR. SPENCE: Sure.

5 THE COURT: If this is truly a discovery-type
6 issue, where you're trying to find out information, that's
7 fine, I gave you leeway to do this. But trying to get an
8 expert to agree with you, they don't. They never do. You
9 make your point by pointing out inconsistencies, pointing out
10 errors, and then your expert gets up and basically takes a
11 shot at his report, and then I decide which one I think is
12 more credible. But having cross-examined expert witnesses
13 myself for 25 years, they don't often -- it's a rare Perry
14 Mason moment they go your way.

15 MR. SPENCE: Your Honor, this is a discovery issue,
16 as I said.

17 THE COURT: Okay. If it's a discovery issue,
18 that's fine. But we have been, for the last 15, 20 minutes,
19 going over this same issue.

20 Now, sir, you have as -- as I recall from
21 yesterday, you have a chart where you have given, in the far,
22 right column, the bases upon which you decided to attribute
23 this as a delivered report; is that correct?

24 THE WITNESS: That is correct.

25 THE COURT: All right. And that, Mr. Spence, may

1 be where you want to go. Maybe you are going there. But
2 there is a multi-page report with names of all the clients
3 and why -- and what factors he relied upon to decide to
4 include it or not include it. That was what I took from
5 yesterday. So, go ahead. But if --

6 MR. SPENCE: So that's a great example, your Honor.
7 So all of those answers are answers we never saw until a day
8 before his testimony.

9 THE COURT: All right. Well --

10 MR. SPENCE: And so I'm trying to figure out -- he
11 had to apply some set of rules to make determinations. So,
12 for example, let's say that the engagement letter mentions
13 Patent Ratings but there is nothing else in any of the other
14 documents that shows anything ever went to the client.

15 THE COURT: Well, I think you need to -- you need
16 to either point out examples to him and have him explain why
17 the absence of certain things he still made a determination
18 that's contrary to what you think it should have been or not.

19 MR. SPENCE: Well, the problem is, if I give him
20 those examples, he is going to then have flexibility to make
21 up rules as he goes. I want to know what rules he applied
22 first, and then I'll put the examples in front of him and see
23 if those examples are consistent with the rules as he applied
24 them.

25 THE COURT: I think he has told you the rules

1 probably four times. I've heard them that way. Maybe there
2 is nuances that I've missed. But I think he has told you the
3 rules he has applied repeatedly to what factors he considered
4 in determining whether or not it ought to be included. It's
5 probably time -- well, it's your call. It's probably time to
6 get to the examples where those rules were applied
7 inconsistently or in an irrational way, or, knowing those
8 factors, for your expert to get up, then, and point out using
9 the factors he has testified to, his report is wrong.

10 BY MR. SPENCE:

11 Q. Okay. Let me ask it this way, Mr. Pakter. If Ocean
12 Tomo looked at some IPQ scores internally and provided a
13 valuation report to the client but never reported anything
14 about those IPQ scores to the client and the client
15 subsequently paid for that report, do you think that would be
16 an external data usage?

17 A. Based solely on that hypothetical, I believe that meets
18 the definition of external data usage.

19 Q. And you had this understanding, didn't you, that Ocean
20 Tomo does a lot of valuation work for its clients; right?

21 A. I understand that Ocean Tomo calculates fair market
22 value under USPAP and other valuation rules.

23 Q. And it did that even prior to having any kind of
24 relationship with PatentRatings; right?

25 A. I don't understand that question.

1 Q. It did so even before the 2004, license agreement;
2 correct?

3 A. I do not know the extent of Ocean Tomo's valuation
4 practice prior to the license and/or amendment.

5 Q. Well, was it your understanding that Ocean Tomo couldn't
6 do any valuation work on a patent without using the
7 Patent Ratings system?

8 A. In this hypothetical you're asking me, it's possible
9 that Ocean Tomo can do a valuation report, though the ones
10 that I reviewed and included list the use of Patent Ratings.
11 And that was part of my body of knowledge.

12 Q. So, in other words, it's your understanding that every
13 time Ocean Tomo provides a valuation for a patent that it has
14 to be using the Patent Ratings system; is that right?

15 MR. LAYDEN: Objection. Mischaracterizes his
16 testimony.

17 THE COURT: Overruled. He can say.

18 BY THE WITNESS:

19 A. I did not say that.

20 BY MR. SPENCE:

21 Q. Mr. Pakter, you gave a deposition in this case on
22 June 6, 2017; right?

23 A. I don't remember the date, but I remember the
24 deposition.

25 Q. Can we go to Page 231, Line 4, please. Mr. Pakter,

1 during that deposition, do you remember me asking this
2 question, and did you give this answer?

3 Question: "Are you assuming that Ocean Tomo can't
4 provide a valuation for a patent without use of the
5 Patent Ratings system?"

6 Answer: "I'm not assuming that they couldn't, but
7 it's my general understanding that they didn't."

8 Did I ask that question, and did you give that
9 answer?

10 A. I did -- you did, I did.

11 Q. Let's take a look at one of your schedules, DX-560,
12 please. And this is your list of royalty owing broken down
13 by each Ocean Tomo client; right?

14 A. Correct.

15 Q. And so if we go to No. 18 on this list, do you see that?

16 A. I do.

17 Q. It says IBM, 2008; right?

18 A. I see it.

19 Q. And for that you list \$289,202. Do you see?

20 A. As a revenue, yes.

21 Q. And based on that revenue, it's your opinion that a
22 13.25 percent royalty should be applied; right?

23 A. Based on the body of the knowledge and my review and
24 analysis of that, I concluded that the applicable royalty
25 rate was 13.25 percent.

1 Q. Right. That's based on your methodology that you
2 applied to determine whether or not royalties were owing;
3 right?

4 A. Correct.

5 Q. Based on your review of the documents related to this
6 IBM engagement; correct?

7 A. Correct.

8 Q. Let's take a look at PX-416. Now, PX-416 is a list of
9 documents that you provided showing that specific client
10 engagements should be royalty-bearing under your analysis;
11 right?

12 A. It is a subset of my full list.

13 Q. Well, this is the entirety of the documents that you
14 relied upon with the exception of two that you recently
15 added; right?

16 MR. LAYDEN: Objection. Mischaracterizes his
17 testimony.

18 THE COURT: Overruled.

19 BY THE WITNESS:

20 A. This is a subset of all of the documents that I relied
21 on in an effort to identify those which related to each
22 particular engagement. It could be another document. For
23 example, I also relied on the prior royalty paid as part of
24 my body of knowledge.

25 BY MR. SPENCE:

1 Q. Have you ever testified differently?

2 A. Not to the best of my recollection and belief.

3 Q. Okay. Let's take a look at your June 6th deposition
4 transcript. Again, this is on Page 224, starting at Line 4.

5 Question: "So you recall in your deposition on
6 May 19th I asked you about specific documents that you were
7 relying upon to make the determination that a specific client
8 engagement was royalty-bearing; right?"

9 Answer: "That's right."

10 Question: "And in that definition you weren't able
11 to identify those documents for me at that time; right?"

12 Answer: "Well, I couldn't identify them for you in
13 every bit."

14 Question: "You couldn't tell me for a specific
15 client engagement which documents, if any, you relied upon to
16 make the determination that it was a royalty -- that it was
17 royalty-bearing; is that fair?"

18 Answer: "I could not with the data in my -- with
19 the data at hand in my deposition at that time cross
20 reference the Ocean Tomo clients and the bates numbers."

21 Question: "And so after that May 19th deposition,
22 you and Mr. Layden agreed to undertake the task of
23 identifying for each specific client engagement that you
24 contend is royalty-bearing all of the documents upon which
25 you relied to make that determination; correct?"

1 A. Correct.

2 Q. "That's correct."

3 A. Right.

4 Q. Question: "And you did so; right?"

5 Answer: "That's correct."

6 Question: "Actually, Plaintiff's Exhibit 85, which
7 I will represent to you is PX-416, is the full index of
8 documents that you relied upon for your determination of
9 whether or not a specific Ocean Tomo client engagement would
10 be royalty-bearing, or not; right?"

11 Answer: "Plus the license and the amendment, yes."

12 Did I ask those questions, and did you give those
13 answers?

14 A. You did, I did.

15 Q. And so if we look back at PX-416, this list of all the
16 documents that you relied upon, we see it's alphabetical. So
17 you have to go through to page -- actually, there is not a
18 page number. If you go alphabetically down, you see an entry
19 for IBM 2008.

20 A. Yes.

21 Q. And the only document that you identify here for IBM
22 2008 is with the bates number OTE-00390663; right?

23 A. I do.

24 Q. So this is the only document that you found showing that
25 this IBM engagement should be royalty-bearing; correct?

1 A. It is possible that there are other documents.

2 Q. Right. But I asked you for a list of everything that
3 you found, and you provided it, and that's here in 416;
4 right?

5 A. And that was my best effort at coming up with a subset.
6 It is possible that there are more documents.

7 Q. Understood. So let's take a look at the document that
8 you identified. Let's pull up PX-811, please. And so this
9 document is in your binder, but it's 742 pages, so we've
10 actually put a few pages in the binder, but we've got the
11 document pulled up on the screen for you as well, Mr. Pakter.

12 And PX-811 is bates-numbered OTE-00390663, which is
13 the document identified in PX-416; right?

14 A. One more time, please.

15 Q. Sure. I'll represent to you, actually, to make this
16 more simple, that this document you're looking at,
17 OTE-390663, is PX-811. Okay?

18 A. Okay.

19 Q. And what this appears to be is an unformatted amount of
20 PatentRatings data; right?

21 A. Correct.

22 Q. And in the header line there is a reference to IPQ. Do
23 you see that?

24 A. Correct.

25 Q. And in the assignee column in every row to the far right

1 it says, International Business Machines Corporation; right?

2 A. I see.

3 Q. That's IBM.

4 A. Correct.

5 Q. And, again, this is the only document that you relied
6 upon as a basis for saying that this IBM engagement should be
7 royalty-bearing; correct?

8 MR. LAYDEN: Objection, asked and answered.

9 THE COURT: Overruled.

10 BY THE WITNESS:

11 A. I may also have looked at a prior royalty report for the
12 reporting, and I would look at the revenue collected.

13 BY MR. SPENCE:

14 Q. Well, you certainly didn't identify any of those
15 additional documents in PX-416, did you, Mr. Pakter?

16 A. Well, I didn't identify the royalty report which relates
17 to every quarter.

18 Q. And you agree with me that this document, PX-811, is not
19 addressed to any Ocean Tomo client; is it?

20 A. It does not have an address label. It is not an e-mail
21 or a letter.

22 Q. Right. It's not one of the e-mail interchanges as you
23 referred to it; right?

24 A. It is not.

25 Q. And you don't cite any other documents in PX-416 to

1 suggest that this was ever delivered to an Ocean Tomo
2 customer or client; right?

3 A. No, only I suggested that the client paid for services.

4 Q. Which client are you referring to?

5 A. In this case, IBM.

6 Q. And you assume that because the document says IBM all
7 over it; right?

8 A. I'm assuming that because revenue was collected from
9 IBM.

10 Q. And also because the document itself shows IBM all over
11 it; right?

12 A. And it was produced pursuant to document requests
13 relating to requests for documents relating to the royalty
14 documents.

15 Q. Okay. Let's take a look at PX-948, please. And if you
16 just scroll down for me. You see here PX-948. I will show
17 it on the screen too, if it's helpful to you, Mr. Pakter. Do
18 you see the PX-948 has a bates number OTE-390660; right?

19 A. I do.

20 Q. And if you go back up to the top it's dated April 6,
21 2008; right?

22 A. Yes.

23 Q. April 16, 2008, rather. Do you see that?

24 A. I do.

25 Q. It's from Mr. Art Romero; right?

1 A. Yes.

2 Q. And it's to an e-mail address, do you see that,
3 sj5.kim@samsung.com. Do you see that?

4 A. I do.

5 Q. Now, the samsung.com domain name, doesn't that suggest
6 to you that that's a Samsung employee?

7 A. It does.

8 Q. And if we look at the body of the e-mail, it says:
9 "Good morning," I believe it's, "Sejin," S-e-j-i-n. Please
10 find attached the zipfile containing all the Excel
11 spreadsheets of the requested company's IPQ scores." Do you
12 see that?

13 A. I do.

14 Q. And there is an attached zipfile. Do you see that as
15 well?

16 A. I do.

17 Q. That zipfile is otpsccrequest4.16.zip; right?

18 A. Yes.

19 Q. And if we go to the native of this, please, and we open
20 up that attachment and you see a bunch of Excel files there;
21 right?

22 A. I do.

23 Q. And if you could just expand the name -- yes, there you
24 go. You see one of those Excel files right there named IBM;
25 right?

1 A. I do.

2 Q. And if we open that IBM file, then I'll represent to
3 you, sir, this is the same file that we looked at, PX-811.

4 And, your Honor, I will just represent to the court
5 that this Excel document, PX-811, that's why the PX-948 has
6 the bates number 0TE390660. And PX-811 has bates number
7 0TE0030663. But PX-811 is part of the attachment to PX-48?

8 THE COURT: All right. So the report that
9 Mr. Pakter prepared to show the support he had for including
10 these as revenue items, which is Plaintiff's 416 for the
11 selection of IBM, a 2008 engagement, he listed a bates
12 number. That bates numbers corresponds back to Plaintiff's
13 811, which also corresponds to Plaintiff's 948?

14 MR. SPENCE: That's right, your Honor.

15 THE COURT: Okay. And where is the work product?
16 Is it just that particular piece -- those pieces of paper?

17 MR. SPENCE: The text -- so I can go through this
18 with questioning, or I can explain to you, Samsung happens to
19 be a subscription client to the Ocean Tomo Patent Ratings
20 system. So they're able to request this type of data from
21 Ocean Tomo on a regular basis. They pay a monthly
22 subscription fee, and, in fact, those royalties have been
23 accounted for.

24 THE COURT: All right. Well, remind me on the
25 subscription basis, what is the royalty situation on those?

1 MR. SPENCE: Treated as an external data sale. So
2 a 25 percent royalty is paid.

3 THE COURT: Okay. All right. Well, you can
4 continue, or, you know, however you want on that. But that
5 explains where -- the process we're going through, so go
6 ahead.

7 BY MR. SPENCE:

8 Q. If we just go back to DX-560. So this is the list of
9 clients that we looked at earlier; right?

10 A. Yes.

11 Q. And you see Samsung is here listed fourth on the list?

12 A. Yes.

13 Q. And as I explained to the judge, there is a 25 percent
14 royalty. Do you see that?

15 A. I see that.

16 Q. And that's because Samsung was a web subscription
17 client; right? You understand that?

18 A. I do.

19 Q. And PatentRatings got paid the royalties for Samsung as
20 a subscription client; right?

21 A. I understand.

22 Q. So in this case your assumption was that any connection
23 between a client name and an IPQ score on a document plus a
24 payment is sufficient for you to determine that that should
25 be a royalty-bearing engagement; right?

1 A. Not in isolation. Again, I take the body of knowledge
2 that I have as a whole regarding the engagement as a whole.

3 Q. And, in this case, based on that body of knowledge as a
4 whole, you determined that the IBM engagement should be
5 royalty-bearing; isn't that right?

6 A. In this case, that was my conclusion, yes.

7 Q. Let's look at another example.

8 THE COURT: And just so I can complete this, how do
9 we get from IBM to Samsung?

10 MR. SPENCE: So, again, Samsung is a subscription
11 client. They're running reports on the OTPR system,
12 including looking at IBM patents. I don't know why they're
13 looking at IBM patents. IBM is the assignee on these
14 patents, so, in other words, the owner, at least at one time,
15 on at least each of these patents.

16 THE COURT: Because there is revenue collected from
17 IBM, which is listed on Line 18 of DX-560.

18 MR. SPENCE: Correct.

19 THE COURT: And there is revenue collected from
20 Samsung.

21 MR. SPENCE: Correct. And so the point is that
22 that is a completely separate engagement that has nothing to
23 do with what Samsung is doing here by looking at these IBM
24 patents. Yet, he has concluded that that IBM engagement
25 should somehow be royalty-bearing, in fact, based on Samsung

1 using the OTPR system to look at IBM patents.

2 THE COURT: All right. Well, the two clients,
3 Samsung and IBM, got charged -- both got charged money.

4 MR. SPENCE: Sure, but the IBM engagement has
5 nothing to do at all with Patent Ratings, and there is no
6 assertion other than this one document that it does.

7 THE COURT: Well, that's why I wanted to see if
8 there is anything that -- it appears that the IBM 2008 --
9 I'll let you talk to your colleague, first make sure you're
10 on --

11 MR. SPENCE: Sure.

12 THE COURT: The IBM 2008 engagement that the
13 witness corresponded to a bates number goes back to a Samsung
14 engagement where they had a subscription agreement that's
15 being paid at 25 percent and that you assert was actually
16 paid to Mr. Barney.

17 MR. SPENCE: Correct.

18 THE COURT: Okay. There is nonetheless somewhere
19 out there an IBM \$290,000 engagement. What was the work
20 product there?

21 MR. SPENCE: So we've looked at all those
22 documents. There is nothing at all that we found related to
23 Patent Ratings in any, way shape or form and no documents have
24 been identified to us to suggest otherwise.

25 MR. LAYDEN: Have those documents been produced?

1 THE COURT: You're asking me?

2 MR. LAYDEN: I'm actually asking counsel because,
3 your Honor --

4 MR. SPENCE: This actually goes back to the audit
5 issue.

6 THE COURT: One at a time, please. One at a time.

7 MR. SPENCE: This kind of goes back to the audit
8 issues, your Honor, which is no matter what we show them,
9 they just come back and say they want more documents, and
10 they won't be satisfied until they actually have access to
11 every single document within Ocean Tomo. You know, this is a
12 critical concern for Ocean Tomo because they're a client
13 services firm that provides information a lot of times on a
14 privileged basis, certainly on a confidential basis.

15 MR. LAYDEN: Your Honor, counsel just
16 represented --

17 THE COURT: Hang on. I would like to respond to
18 that.

19 MR. SPENCE: And so to have them come in and look
20 at every single document throughout the entire company not
21 only would take an inordinate amount of time and money but
22 also raise some serious concerns with our clients.

23 THE COURT: Well, if you have some concerns about
24 the clients, I suggested this Day 2 of this trial, that you
25 ought to do a private arbitration, not a public trial in a

1 courtroom like this. You made the decision, both sides did,
2 to use the courtroom for this and the discovery tools allowed
3 for parties in discovery.

4 MR. SPENCE: We did move to arbitrate, your Honor,
5 and we lost that motion.

6 THE COURT: All right. But I think you're
7 plaintiff in this case; correct?

8 MR. SPENCE: In this case we happen to be, yes.

15 There was an IBM engagement where IBM made
16 \$290,000. Was there any document produced by you to show
17 what IBM got for their \$290,000?

18 MR. SPENCE: Do you know offhand what was produced?
19 I don't know -- so, again, this goes back to the way that the
20 production was done as well, which is part of my involvement.
21 But the parties agreed to do what's called predictive coding
22 And so there is this massive exchange of terms, and they went
23 back and forth and tried to train a system to go through and
24 look at all of Ocean Tomo's documents and select the ones
25 based on the training that were relevant to the litigation.

1 That litigation went on for a number of years. We got
2 involved. At that point, the production is what it is.
3 We've tried to go back and find things the best we can.

4 We also have done sampling. We've offered to do
5 not only the 25 initial engagements, but then a subsequent
6 25. And I can't remember the exact number, but I think Judge
7 Rowland ended up, late in discovery, letting them have access
8 to maybe another 80, or so. So this issue was in front of
9 the magistrate continuously. We tried to resolve it the best
10 we could. We allowed them to do sampling, and they certainly
11 could extrapolate from that sampling if they had done it in
12 the right way.

13 THE COURT: Here is the answer, folks. Discovery
14 is over. Judge Rowland supervised discovery. If she thought
15 that there was additional discovery that needed to be taken
16 or a different trial date that needed to be set in light of
17 the difficulties in getting discovery, that ship has sailed.
18 Defendant has the burden of proof as to whether or not proper
19 royalties were paid. You are -- you got dealt the hand you
20 got dealt. If you don't think you got the right amount of
21 records, then you should have gone in on a motion to compel.
22 And if you thought that moving forward on a trial date that I
23 set was unfair because you didn't get all the records you
24 were supposed to get, you know, your remedy is something that
25 that ship has sailed, too. You all have to deal with the

1 evidence each of you gave to each other. And, you know, if
2 there is no record of what IBM got for an engagement in 2008,
3 you know, that's a factor I have to take into consideration
4 of whether you've met your burden of proof as to whether or
5 not IBM's work product utilized the Patent Ratings system.
6 And, you know, there is -- they picked one, they being Ocean
7 Tomo, picked one example where it's pretty clear that what,
8 based on his chart of what he relied upon, we got to where we
9 are right now. I don't know how many more examples they have
10 of that. I don't know if -- but the burden of proof is
11 yours, and you're going to have to just deal with the
12 evidence and the discovery you have now.

13 MR. LAYDEN: Your Honor, if I could briefly
14 respond?

15 THE COURT: You may.

16 MR. LAYDEN: A couple things. First of all, just
17 to add to something Mr. Spence said about discovery, and I
18 know he has acknowledged he wasn't involved during the time
19 most discovery was going on. In addition to the predictive
20 coding exercise, which we went through, we made specific
21 requests for documents relating to a number of engagements,
22 including a number of the engagements in Mr. Pakter's report.

23 The second thing is, your Honor, you've already
24 seen some evidence in this trial, Ocean Tomo, in at least
25 some instances we know of from the discovery, destroyed

1 documents relating to these engagements, in some cases
2 relating to client requests.

3 And so the problem we have, your Honor -- and I
4 certainly recognize it's our burden of proof. But in a
5 situation where we are here where we are, and Ocean Tomo has
6 refused to give us documents for these, either because they
7 don't have them or they just think it's too burdensome, and
8 for them then to come in and say, well, if you don't have an
9 actual deliverable to a client with an e-mail, I think that
10 is not a fair argument to make.

11 The other thing, your Honor --

12 THE COURT: Well, they can make the argument.

13 MR. LAYDEN: They can make the argument.

14 THE COURT: I have to accept it or not.

15 MR. LAYDEN: I understand. That's why I said it
16 was unfair. I'm not saying they can't make argument, but I
17 don't think it's a fair argument.

18 The second thing, your Honor, and this -- I want to
19 pick up something Mr. Spence just said, I maybe misunderstood
20 him. He indicated they looked at some things, and my
21 question is, are all the things they've looked at been
22 produced. Because if he is representing to the court
23 something about documents weren't produced, then I think we
24 have a right to get those documents. I'm not suggesting that
25 we reopen discovery, but if there are documents that they've

1 looked at that haven't been produced, I don't think that's
2 appropriate either.

3 THE COURT: Well, maybe you can ask those questions
4 of Ms. Johnson when she testifies.

5 MR. LAYDEN: I certainly will.

6 THE COURT: But, you know, there is an instruction
7 under the Seventh Circuit pattern instructions relating to
8 spoliation or destruction of evidence. You need proof of it,
9 but I can take an adverse inference if I find by a
10 preponderance that a party intentionally destroyed evidence
11 or caused evidence to be destroyed. If it's destroyed in the
12 ordinary course of business, if they don't keep a 2008 report
13 for IBM, I don't know if they do or not.

14 MR. LAYDEN: Well, your Honor, though, the point,
15 briefly, is that -- and Judge Rowland actually raised a
16 concern about this in one of the conferences we had in front
17 of her. The documents were destroyed after litigation
18 commenced. So this is not Ocean Tomo destroying a document
19 in 2009. There are e-mails in this case, some of which we
20 marked, and we will certainly provide additional examples to
21 the court, where Ocean Tomo, after this litigation was
22 pending and after we had served discovery requests relating
23 to these documents, destroyed the documents. And they're
24 going to say they did it in response to discovery requests,
25 client request. But our position is, they should have come

1 to Judge Rowland and said, hey, we have a client request to
2 destroy documents. They didn't do. That went ahead and
3 destroyed them. We only found out about it in retrospect.

4 MR. SPENCE: Just like Mr. Barney didn't do
5 anything other than wipe his computer before he gave it back
6 to us.

7 THE COURT: Well, let's --

8 MR. SPENCE: We can both make the same type of
9 allegations going each way, but it doesn't serve any purpose.
10 We have the discovery that we have. We're doing the best we
11 can with it. When I said I went through the documents, I'm
12 talking about I went through our production database. We
13 have a relativity database, and we looked through the
14 documents, just like I assume opposing counsel does.

15 The fact of the matter is 99 percent of these
16 engagements have nothing to do with Ocean Tomo Patent Ratings.
17 But Mr. Barney wants to use discovery as leverage to try to
18 get a settlement that he couldn't otherwise get based on the
19 value of Patent Ratings. You're talking about a system that
20 was developed back in 2004, and he wants to charge not just
21 the same price, but many times a multiple of the price that
22 he used to charge, you know, now 13 years ago. That's not
23 how technology works.

24 THE COURT: It might not be, but contracts and
25 license agreements work --

1 MR. SPENCE: But then Ocean Tomo had the right not
2 to use it.

3 THE COURT: Don't interrupt. It might not be, but
4 license agreements and operating agreements that have -- that
5 are still in operation, don't have finite dates of sunset
6 clause, are what I have to interpret and what I have to
7 decide.

8 If -- I'm not going to reopen discovery. If you or
9 Ms. Johnson, or you through your cross examination of this
10 witness or Ms. Johnson through her testimony, want to point
11 out that 99 percent of all these engagements didn't use
12 Mr. Barney's -- didn't use Mr. Barney's system as under the
13 definitions of external data use and external data -- give me
14 the other one -- external data sales and external data usage,
15 so be it. That's what I have to decide. And you can present
16 that through cross-examination or through Ms. Johnson's
17 testimony, or Mr. Malackowski's testimony.

18 MR. SPENCE: To be clear my -- what I meant to say
19 is the -- 99 percent of our documents that they're trying to
20 get from us have nothing to do with Ocean Tomo Patent Ratings.
21 But the only way that they get to a satisfaction in discovery
22 is they want access to every document. There is something
23 called proportionality. And they don't simply get to come in
24 and look at everything because they think that a few things
25 might be missing.

1 THE COURT: Well, that's what I am going to review
2 as to whether or not there is cooperation on the audit. The
3 overall issue about, they asked for more documents than they
4 should have in discovery, is exactly why I referred this to
5 Judge Rowland so I didn't have to deal with this issue.

6 MR. SPENCE: And she ruled on those issues.
7 Counsel wants to keep arguing them.

8 THE COURT: Well, she ruled the way she ruled, and
9 we are all here today to try the case. If you think there
10 are records that got destroyed or would support your theory
11 and you have evidence of it, then there is a spoliation
12 argument you can make and an adverse inference that you'll
13 ask me to draw from the fact that the absence of records that
14 were in existence at one time and then are no longer in
15 existence. If you think there are mistakes that this witness
16 made, you exploit them through cross examination or through
17 Ms. Johnson's testimony. That's how cases are tried. But
18 we're not going to re-visit discovery issues, other than the
19 parameters I just gave you. We're not going to re-visit
20 those, and I'm not sympathetic to either side about the fact
21 of burdensomeness, the fact of confidential things being
22 disclosed because you made your bed by coming to court. And
23 you're in federal court now. I'm not trying to be
24 condescending. That's what we do in court, and you know
25 that. And that's what we have to do. So we have to

1 concentrate on the matter at hand, which is working with what
2 you got, both sides. This is not -- I'm looking at both of
3 you on this.

4 So we have -- it's 4:58. Are you going to be done
5 in two minutes?

6 MR. SPENCE: No, your Honor.

7 THE COURT: Then we're going to continue tomorrow
8 morning at 9:30. Anything else we need to put on the record?

9 MR. LAYDEN: Your Honor, one quick thing, just so I
10 don't forget, we had a number of exhibits we identified last
11 night to see if we could get a stipulation on. We can do it
12 tomorrow if you want to, your Honor. But I can just read
13 them into the record. It's up to you.

14 MR. SPENCE: We actually also sent a number of
15 exhibits to them to ask for the same stipulations. I don't
16 know if we have a response yet.

17 MR. LAYDEN: Well, it came over five minutes before
18 I came to court. So we will look at it tonight, your Honor.

19 THE COURT: Yes, then jointly just give me --
20 rattle off a list that our court reporter can put into the
21 record and each side will say agreed, and I will say
22 admitted, and we will move from there. But you can both do
23 it tomorrow. Anything else on the record?

24 MR. LAYDEN: No, your Honor.

25 MR. SPENCE: No, your Honor.

C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ SANDRA M. MULLIN
SANDRA M. MULLIN, CSR, RMR, FCRR
Official Court Reporter

August 29, 2017